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Supreme Court, U.S.
FILED
99 1019 DEC 7 1999
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No. 99-____

In the Supreme Court of the United States

OCTOBER TERM, 1999

WORTHINGTON CORPORATION,
Petitioner,

v.

ELAINE RONSINI, EXECUTRIX OF THE ESTATE OF FRANK RONSINI

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Contrary to this Court's articulation of the government contractor defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) and *Hercules, Inc. v. United States*, 516 U.S. 417 (1996), and in conflict with decisions of the Fourth, Fifth, Sixth and Seventh Circuits, the state court in this case held that a defendant in a products liability case based on a failure-to-warn theory is not entitled to submit the government contractor defense to the jury absent the "proscription of a warning" by the United States Navy. Accordingly, the question presented is:

Whether the government contractor defense preempts a state law failure-to-warn tort claim only when military specifications expressly prohibit a warning?

PARTIES TO THE PROCEEDING

Petitioner Worthington Corporation was one of 35 defendants in the initial stages of the proceedings in the trial court. The respondent in this Court, the plaintiff in the trial court, is Elaine Ronsini, Executrix of the Estate of Frank Ronsini.

Other defendants in the trial court were: Garlock, Inc.; H&A Construction; Asbestospray Corp.; Robert A. Keasbey Co.; Combustion Engineering, Inc.; U.S. Mineral Products, Co.; Owens-Corning Fiberglass Corp.; Rockwool Manufacturing Co.; The Anchor Packing Co.; Foster Wheeler Energy Corp.; Pittsburgh-Corning Corp.; Rapid-American Corp. as successor-in-interest to Philip Carey Manufacturing Corp.; John Crane, Inc.; A.W. Chesterton Co., Inc.; Atlas Turner, Inc.; Allied Corp. as successor-in-interest to The Bendix Corp.; Westinghouse Electric Corp.; Rutland Fire Clay Co. d/b/a Rutland Products; General Electric Co.; Uniroyal, Inc.; IMO Industries, Inc. as successor to and formerly known as DeLaval Turbine, Transamerican DeLaval and IMO DeLaval; York Industries Corp.; Standard Insulation Co.; Crown Cork & Seal Co., Inc.; Ingersoll-Rand Co.; Gould Pumps, Inc.; Quaker Chemical Corp.; Selby Battersby & Co.; General Motors Corp.; Detroit Diesel Corp. as successor to Detroit Diesel Allison Division of General Motors; Volkswagen of America, Inc.; VW Venture Corp., formerly known as or as successor to World Wide Volkswagen Corp.; Volkswagen Werk Aktiengesellschaft; and Raymark Industries, Inc.

The case was tried using a "reverse" bifurcation format, in which damages were litigated first. Following the damages phase of the trial, the plaintiff settled, discontinued, or otherwise dismissed the actions against all defendants except Worthington Corporation and Atlas Turner, Inc. At the subsequent liability trial, the only defendants were Worthington and Atlas Turner.

RULE 29.6 STATEMENT

Petitioner Worthington Corporation's corporate parent is Dresser Industries, Inc, which is a wholly-owned subsidiary of Halliburton Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Worthington Corporation respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department in this case.

OPINIONS BELOW

The decision and order of the Appellate Division, First Department is reported at 683 N.Y.S.2d 39 (Appendix to Petition for Certiorari ("App.") 1a). The orders and opinions of the trial court (App. 6a & 21a) are unreported.

JURISDICTION

The judgment of the Appellate Division, First Department was entered on December 29, 1998. App. 1a.

The Appellate Division, First Department denied a timely motion for reargument or leave to appeal on May 18, 1999. App. 28a. The New York Court of Appeals denied a timely motion for leave to appeal on September 16, 1999. App. 30a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Other constitutional provisions at issue in this case (Art. I, § 8, cls. 1, 12-14; Art. II, § 2, cl. 1) are reprinted in the Appendix. App. 32a.

STATEMENT OF THE CASE

More than 50 years after it sold pumps and compressors to the United States Navy for use on warships in World War II, petitioner Worthington Corporation was held liable by a New York State court on a products liability claim. The adverse judgment in this case is premised on personal injuries allegedly caused by Worthington's failure to issue warnings to military personnel. That result is all the more remarkable because: (1) Worthington strictly complied with all applicable military specifications; (2) there was no claim that the design of the equipment was in any way defective; (3) Worthington did not know of any risk to

workers such as respondent; (4) respondent's military service began more than 25 years after the equipment was manufactured and sold; and (5) the U.S. Navy had complete control over the plaintiff's working conditions (including cautionary warnings).

The decision below summarily disposed of petitioner's government-contractor defense, holding that the jury need not even be instructed on this issue of federal law. That decision conflicts with decisions of the Fourth, Fifth, Sixth and Seventh Circuits. It is also inconsistent with this Court's holdings on the government-contractor defense in *Boyle v. United Technologies*, 487 U.S. 500 (1988) and *Hercules, Inc. v. United States*, 516 U.S. 417 (1996).

These conflicting decisions on an important issue of federal law should suffice to warrant this Court's review. In fact, there are further compelling reasons for certiorari. The government contractor defense to state law tort claims poses questions vital to the proper functioning of our federal system. One need go no further than this Court's current docket to perceive the primacy of federalism issues, specifically as they relate to preemption of state law. This case presents an opportunity to address the relative roles of the state and federal governments in a uniquely important and practical context: military procurement of equipment to "provide and maintain a Navy" (U.S. Const., art. I, § 8, cl. 13) and "provide for the common defense" in wartime. U.S. Const., art. I, § 8, cl. 1.

In addition, the continuing and recurring importance of the question presented in this case is reflected in the fact that seven of the federal courts of appeals have addressed this issue, as have appellate courts in numerous states. As the lower courts have observed, those appellate holdings "vary widely." *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 717

(D. Md. 1997). In these circumstances, the justifications for this Court's review are compelling.

1. During World War II, Worthington Corporation ("Worthington") manufactured and sold hundreds of pumps and compressors to the United States Navy for installation on Fletcher class destroyers. As required by its Navy contracts, Worthington manufactured the equipment in strict compliance with detailed military specifications. App. 48a-49a, 53a-59a, 63a-65a. Applicable military specifications expressly required the internal component parts of the equipment to include asbestos-containing gaskets. App. 50a-54a. The military specifications also included explicit requirements for markings on the equipment and for the preparation of technical manuals. App. 53a, 55a-59a, 60a-62a. The technical manuals Worthington was required to prepare were reviewed and approved by the Navy; subsequently, the Navy issued its own revision of some of the manuals. App. 63a-65a, 69a-70a. Worthington could not make changes to either the design of the equipment or the technical manuals without Navy approval. App. 66a.

Worthington's equipment was installed on the U.S.S. John W. Weeks, before its commissioning in 1943, and on the U.S.S. Gearing, before its commissioning in 1944. App. 49a. Over the ensuing 25 years -- before respondent's brief time on board -- both ships saw substantial combat, including service during World War II, the Korean conflict, and the Cuban missile crisis. U.S. Navy, Dictionary Of American Fighting Ships, vol. 8, 194 and vol. 3, 31 (1967).

2. Frank Ronsini served on the U.S.S. Weeks and U.S.S. Gearing at various times during the Vietnam conflict from 1968 until 1972. In his work as a machinist, Ronsini was exposed to a wide variety of asbestos-containing

products while maintaining and repairing equipment in the engine rooms of both destroyers. App. 42a-47a.

3. In 1996, Ronsini brought a personal injury suit against Worthington and 34 other defendants, claiming that they manufactured or sold asbestos-containing products to which he was exposed in the Navy and elsewhere from 1967 through 1973. Ronsini's sole theory of liability against Worthington was that Worthington failed to warn him of the danger allegedly inherent in the use of asbestos-containing component parts inside the Worthington equipment. App. 41a, 66a-71a.[1]

At trial, Worthington asserted the government-contractor defense to preclude liability for products sold to the Navy in accordance with military-prescribed specifications. Worthington introduced evidence to support this proposition by showing that there were no dangers of which Worthington was aware that the Navy was not. App. 36a-40a. Indeed, the Navy had far greater and more sophisticated knowledge of the potential hazards and dangers of asbestos-containing products than did Worthington. App. 36a-39a. And, as the trial court found on the record in this case, Worthington had no knowledge of a risk about which it could have warned workers like respondent. App. 8a. Based on this record, Worthington requested a jury instruction on the government contractor defense. Drawing directly from this Court's language in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), Worthington requested that the jury be instructed that a contractor could not be liable for:

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[1] Respondent expressly disavowed all claims against Worthington based on any alleged design defect in its product: "I am withdrawing my design defect claim." App. 41a.

> goods supplied to the military if the United States approved reasonably precise specifications of the products, the material conformed to those specifications, and the supplier warned the United States about the dangers and the use of the materials that were known to the supplier but not to the United States.

App. 67a. In response, respondent's counsel argued that the government contractor defense does not apply to claims based on an alleged failure to warn: "Compliance with standards is irrelevant. It doesn't matter one way or the other if you comply with standards." App. 70a; *see* App. 67a-68a. Ultimately, the trial judge gave the jury the following charge:

> Adherence to government standards while important, and some evidence of reasonableness, does not relieve a party from the obligation to make its product safe. Compliance with those standards by a defendant, even if proven, doesn't preclude a finding of a liability. However, you should take compliance into consideration in deciding whether or not the product was safe.

App. 73a.[2] Accordingly, the jury was permitted to impose liability even if it found that Worthington acted in strict

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2 Petitioner also argued that any warning would have been nullified and totally ineffective in light of the exigencies of military service in wartime and the Navy's total control over respondent's working conditions. On this point, respondent testified unequivocally that during his military service on board the ships he had no control over his working conditions, much less the right to decide whether to work

compliance with all federal standards and military specifications.

4. The jury returned a verdict in favor of Ronsini, specifically finding that Worthington's products were defective because they lacked warnings. App. 16a. On post-trial motions, the court expressly found that "[t]here is no evidence in the record that Worthington knew of the risk of the asbestos containing product that the jury found that Frank Ronsini used to workers like him so that Worthington 'could have warned him.'" App. 8a. Nevertheless, the trial court upheld the finding of liability. In denying Worthington's post-trial motion to set aside the verdict, the court offered no discussion of the government-contractor issue ("[t]he issues Worthington raises, including the 'Navy' defense, require no further discussion...."). App. 7a.

5. The New York Supreme Court, Appellate Division, First Department, affirmed. App. 1a-5a. With respect to the government-contractor defense, the appellate court held that petitioner was not entitled to have the jury even consider the issue: "In the absence of any evidence of a conflict between State warning requirements and any Federal prescription of label information or proscription of a warning, there was no basis for Worthington's requested government contractor defense charge ...." App. 3a. The New York Court of Appeals denied review. App. 30a-31a.

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with gaskets in the Worthington equipment or the right to decide what to wear when performing such maintenance services: "It wasn't like a regular job. It wasn't a union." App. 34a. Notwithstanding this record, the trial judge instructed the jury that: "Each worker had a right to decide for himself whether to work and what he would wear as protection before continuing to work." App. 75a.

REASONS FOR GRANTING THE PETITION

The judgment below is incorrect and conflicts with decisions of this Court and federal courts of appeals on a recurring issue at the very core of our federal system. The decision below is contrary to the Supremacy Clause and to the Constitution's express assignment to the federal government of the power to "provide and maintain a Navy" and to "make Rules for the Government and Regulation of . . . naval Forces." U.S. Const. art. VI, cl. 2; art. I, § 8, cls. 13, 14. Moreover, the decision below does not adhere to this Court's articulation of the government-contractor defense in *Boyle* and *Hercules* and it squarely conflicts with decisions of federal circuit courts of appeals. *See* pp. 13-19, *infra*.

Under the decision below, a government contractor that assists its country in wartime (by providing equipment exactly as Navy specifications required) can be held liable under state tort law theories more than a half-century later. Recognizing the inherent incompatibility between state law liability and the constitutional imperatives for government procurement and military preparedness, this Court and federal courts of appeal in at least four circuits have rejected the imposition of such liability on government contractors in these circumstances.

This case is one of many in which state courts have imposed liability on government contractors that federal cases clearly prohibit. The impact of the decision below is pointedly deleterious to federalism principles, particularly as they apply to the military. Contrary to prevailing federal standards, the rationale for liability is the absence of "warnings" to military personnel serving decades after the equipment was sold. As this case illustrates, such a regime of liability would have profound repercussions: the contractor had no knowledge at the time of sale of any risk to

military personnel performing these maintenance tasks, yet is liable for failing to issue warnings to a sailor who was not born until years after the Navy purchased the equipment. By requiring government contractors to issue state-created warnings directly to servicemen, notwithstanding the U.S. Navy's total control over their working conditions, the decision below poses an ominous threat to national uniformity in an area that is uniquely and exclusively federal. By any measure, this case satisfies all accepted standards for certiorari. It fully warrants this Court's review.

I. THE CONSTITUTION AND THE GOVERNMENT-CONTRACTOR DEFENSE REQUIRE UNIFORMITY OF DECISIONS

1. The decision below directly impinges upon the federal government's constitutional authority and duty to provide for the common defense. As this Court has observed, the government-contractor doctrine has strong constitutional underpinnings.

Article I, section 8, clauses 12 through 14 of the Constitution grant Congress the exclusive power to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces." *See also* Article II, section 2, clause 1. This language embodies the framers' intent that powers essential to the common defense vest exclusively in the federal government. *See* Federalist Papers, No. 23, "The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union" (Dec. 18, 1787). Moreover, the framers recognized that state interference in military matters would undermine the national defense. *Id.*

This Court, too, has long recognized that the federal government's power to provide for the common defense is

necessarily plenary and exclusive. *See, e.g., Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1871) ("No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service"). Accordingly, the constitutional power to support the armed forces with equipment and supplies is as "clear and sweeping" as the power of conscription. *Lichter v. United States*, 334 U.S. 742, 756 (1948). States are precluded from interfering with the federal government's exclusive war-making powers. This proscription is so pervasive and inviolate that it applies even when issues traditionally reserved for the states are involved. For example, in *United States v. Oregon*, 366 U.S. 643 (1960), a case involving a mentally incompetent veteran who died intestate in a veteran's hospital, the Court upheld a federal law requiring that the veteran's personal property be used for the comfort and recreation of other veterans, notwithstanding an Oregon statute requiring that property left intestate escheat to the state and the traditional jurisdiction of states over the devolution of property. Similarly, in *McCarty v. McCarty*, 453 U.S. 210 (1981), the Court held that application of California's community property law in a divorce proceeding would frustrate the federal military retirement system.

2. Drawing on these same fundamental principles, this Court has correctly perceived the need to assure government contractors that their adherence to federal specifications will not open the door to conflicting state tort liability schemes. Any departure from this rule would impair the government's ability to procure effective military equipment. As this Court observed in *Boyle*, "the selection of the appropriate design for military equipment to be used by our Armed Forces ... often involves not merely engineering analysis but judgment as to the balancing of

many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." 487 U.S. at 511.

State courts are particularly ill-suited to second-guess military decisions. *See Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1322 (11th Cir. 1989) ("With respect to consumer goods, state tort law may hold manufacturers liable where such a balance [between safety concerns and cost and performance] is found unreasonable. In the sensitive area of federal military procurement, however, the balance is not one for state tort law to strike"), *cert. denied*, 494 U.S. 1030 (1990); *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986) ("There is a danger in transporting the rubric of tort law and product liability to a military setting and military technology. While jurors may possess familiarity and experience with consumer products, it would be the rare juror – or judge – who has been in the cockpit of a Navy RF-86 off the deck of a carrier on a low level, high speed fly-by maneuver."), *cert. denied*, 487 U.S. 1233 (1988); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983) ("to hold military suppliers liable for defective designs where the United States set or approved the design specifications would thrust the judiciary into the making of military decision"), *cert. denied*, 464 U.S. 1043 (1984).

Consistent with the Constitution and this Court's directives, federal courts recognize that:

> The purpose of [the] defense ... is to permit the government to wage war in whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks

> to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and should be exempt from review by civilian courts.

In re "Agent Orange" Prod. Liab. Litig., 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982). *Accord Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 740 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988) ("The military contractor defense is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with sovereign immunity, but because traditional separation of powers doctrine compels the defense.")

Permitting states to second-guess military procurement decisions through the imposition of state tort liability on government contractors "will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Boyle*, 487 U.S. at 507. *Cf. United States v. Winstar Corp.*, 518 U.S. 839, 913 (1996) (Breyer, J. concurring) (commenting on a different protection for parties to government contracts that "in practical terms it ensures that the government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting").

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

1. New York's limitation of the government contractor defense conflicts with this Court's articulation of the defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and *Hercules Inc. v. United States*, 516 U.S. 417 (1996). Indeed, the trial court denied Worthington's proposed jury instruction that incorporated the language of *Boyle* verbatim. The Appellate Division went a step beyond, holding that the government-contractor defense need not even go to the jury. App. 3a.

In *Boyle*, this Court held (487 U.S. at 512) that:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Consistent with that standard, the Court explained in *Hercules Inc. v. United States*, 516 U.S. 417, 421 (1996), that the government contractor defense "shields contractors from tort liability for products manufactured for the Government in accordance with Government specifications, if the contractor warned the United States about any hazards known to the contractor but not to the Government." Under this standard, the trial court's correct and undisturbed finding that there was no evidence that Worthington knew of a risk to

workers such as respondent should have resulted in entry of judgment for Worthington. App. 8a.

2. *Boyle* recognized that the government contractor defense is necessary to permit the armed forces to procure effective military equipment in an efficient manner and to avoid judicial scrutiny of military procurement decisions. This interest exists regardless of "the label attached to the claim." *Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 801 (5th Cir. 1993). For that reason, the federal courts of appeals have unanimously held that the government contractor defense applies to state law failure-to-warn claims as well as to the design defect claims alleged in *Boyle*.[3] But the courts are directly in conflict and irredeemably fragmented on how to apply the government contractor defense to failure-to-warn claims: "[A]ll appear to recognize the applicability of the defense to a failure to warn claim, but the applications vary widely." *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 717 (D. Md. 1997) (analyzing conflict among decisions of the Second, Fifth, Sixth, Ninth and Eleventh Circuits).

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[3] *See Emory v. McDonnell Douglas Corp.*, 148 F.3d 347 (4th Cir. 1998); *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744 (9th Cir. 1997); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *In re Air Disaster at Ramstein Air Base, Germany*, 81 F.3d 570 (5th Cir.), *mod. on other grounds*, *Perez v. Lockheed Corp.*, 88 F.3d 340 (5th Cir.), *cert. denied*, 519 U.S. 1028 (1996); *Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995); *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487 (11th Cir. 1990); *In re Joint E. & S. D. New York Asbestos Litig.*, 897 F.2d 626 (2d Cir. 1990).

The decision below exemplifies key issues on which the nation's appellate courts are divided. For example, the New York court below engrafted additional requirements on the three-part *Boyle* test. The first element in *Boyle* requires only that the United States approve reasonably precise specifications, not that it consider and reject a particular alternative required by state law. Furthermore, the third element in *Boyle* requires only that the contractor warn the United States about dangers known to the contractor but not the government; in contrast, the decision below requires the contractor to warn of all dangers about which the contractor knows or reasonably should have known. Similarly, the decision below requires the contractor to show a "significant conflict" between the particular military specifications and its state law duty to warn. That standard effectively turns *Boyle* on its head. The very purpose of the *Boyle* test was to define those circumstances that present a "'significant conflict' ... between an identifiable 'federal policy or interest and the [operation] of state law.'" *Boyle*, 487 U.S. at 507 (citation omitted). Adding these additional elements to *Boyle* narrows the scope of the protection and allows states to second-guess military procurement decisions.

3. On the question presented in this case, there is an acknowledged split among the federal appellate courts. *See Yeroshefsky*, 962 F. Supp. at 717-18; *Russek v. Unisys Corp.*, 921 F. Supp. 1277, 1289 (D.N.J. 1996). Two circuits (the Fourth and Fifth) strictly apply *Boyle* to failure-to-warn claims; two circuits (the Sixth and Seventh) apply *Boyle* with slight modification that would have led to a different result below; two circuits (the Ninth and Eleventh) apply the same extreme modification of *Boyle* endorsed by the court below; and one circuit (the Second) has modified *Boyle* in a somewhat ambiguous manner that has been interpreted in conflicting ways by other courts. Ultimately, the practical impact of the conflict is that the result in this case would

have been different if it had been decided by four, and possibly five, federal courts of appeals.

a. The Fourth and Fifth Circuits have held that satisfaction of the three-part *Boyle* test is itself sufficient to preempt state law failure-to-warn claims. *See Emory v. McDonnell Douglas Corp.*, 148 F.3d 347, 352 (4th Cir. 1998) ("Indeed, when the Navy possesses the same knowledge as its contractor, a requirement that the contractor provide additional warnings to individual pilots risks disruption of the chain of command. A contractor cannot be forced to provide warnings to officers that would contradict orders received from their superiors"); *Smith v. Xerox Corp.*, 866 F.2d 135, 137 (5th Cir. 1989) (affirming summary judgment in favor of defendant in case involving both design defect and failure to warn claims, based solely on establishment of three-part *Boyle* test and observing that: "*Boyle* ... held that the government contractor defense applies to both negligence and strict liability actions, as well as to other state law tort claims").[4]

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[4] *But see In re Air Disaster at Ramstein Air Base, Germany*, 81 F.3d 570, 576 (5th Cir.) ("A *separate failure to warn claim may survive* the government contractor immunity defense if the defendant cannot establish 'an identifiable federal interest or policy in the existence or methods of warning and a significant conflict between the federal interest or policy and the operation of state law.'... However, *if the failure to warn claim is part of the design defect* or unreasonably dangerous product theory of liability, then government contractor immunity applies") (emphasis added; citations and footnote omitted), *modified on other grounds, Perez v. Lockheed Corp.*, 88 F.3d 340 (5th Cir.), *cert. denied*, 519 U.S. 1028 (1996).

b. The Sixth and Seventh Circuits, taking a different course, have modified the *Boyle* test with respect to failure-to-warn claims. *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1003-1004 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) (adopting Sixth Circuit test). The Sixth Circuit's modification of *Boyle* requires that the contractor show additional government involvement in the decision whether to give a warning:

> When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.

Tate, 55 F.3d at 1157.

The Sixth Circuit test, however, does not go to the extreme reflected in the decision below. Accordingly, the Sixth Circuit does not require that the specifications either dictate or expressly prohibit warnings. *Id.* ("We reiterate that the FTCA's discretionary function exemption delineates the contours of the defense. Government discretion is required, not dictation or prohibition of warnings"); *accord Tate v. Boeing Helicopters*, 140 F.3d 654, 660-61 (6th Cir. 1998) ("Contrary to plaintiffs' argument, the government contractor defense is not narrowly confined to those situations where a particular military specification directly conflicts with state law. Instead, the defense applies

whenever state tort liability would otherwise restrict the government's ability to exercise its discretion in military matters. This includes those situations in which the government makes the informed decision not to include a specification or require a warning because, in the government's view, one would be unnecessary or problematic.... Therefore, once the three conditions of the *Tate I* analysis has been satisfied, and government discretion has thus been established, significant conflict exists and the government contractor defense applies"); *Oliver*, 96 F.3d at 1004 n.8 ("We cannot accept as consistent with *Boyle* the suggestion that there is any strict requirement that the government 'prohibit' warnings altogether or 'dictate' the contents of the warnings actually incorporated").

c. In contrast to all of these cases, the Ninth and Eleventh Circuits, as well as the New York court below, have added to the *Boyle* test a requirement that the specifications either dictate the terms of the warning or expressly prohibit the contractor from adding warnings. In *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 812 (9th Cir. 1992), the Ninth Circuit held that the government contractor defense was inapplicable because "the Navy in no way prohibited [appellants] from placing warnings on their insulation products," and "[t]here thus existed no conflict between their state law duty to provide adequate warnings to the users of their insulation and the conditions imposed on them pursuant to the agreements they had entered into with the Government." *Accord Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489 (11th Cir. 1990) (*per curiam*) (finding no conflict between state-imposed duty to warn and specifications for asbestos-containing cement used at Navy shipyard because the specifications, which required standard commercial packaging, "d[id] not contain any prohibition against health warnings on the product").

d. The position of the Second Circuit has been interpreted in varying ways. In *In re Joint Eastern & Southern District New York Asbestos Litigation*, 897 F.2d 626, 633 (2d Cir. 1990), the court remanded for the district court to determine whether there was a significant conflict between the military specifications and state law duty to warn, observing that: "Just as nothing in the relevant specification discusses product warnings, nothing in the specification purports to place a limit upon any additional information a manufacturer may have wished to convey to those using the product." Although some district courts have incorrectly construed this holding to require that the specifications expressly prohibit warnings, the Second Circuit opinion does not support such a reading. Rather, the Second Circuit itself observed that its holding is consistent with *Nicholson v. United Technologies Corp.*, 697 F. Supp. 598, 604 (D. Conn. 1988), in which the district court held that when "the government provides 'reasonably precise' specifications for the contents of a maintenance manual," a contractor cannot "be held liable for deficiencies in the contents" of the manual. *Id.* at 604; *see* 897 F.2d at 633 ("*Nicholson v. United Technologies Corp.* is not to the contrary"). Accordingly, in *Oliver v. Oshkosh Truck Corp.*, 96 F.3d at 1004 n.8, the Seventh Circuit correctly questioned whether the Second Circuit "necessarily states a more stringent standard than the one employed by the Sixth Circuit."

e. In contrast to the prevailing view in the federal courts, some state courts of last resort have held that the government contractor defense does not apply to failure-to-warn claims unless the specifications expressly prohibit the contractor from adding a warning required by state law. *See Miller v. United Technologies Corp.*, 660 A.2d 810, 836 (Conn. 1995) ("the government contractor defense applies only if the government dictated with reasonable precision the

content of the initial warnings included in the operational or maintenance manuals *and limited or precluded the contractor from advising the user of additional information or revisions*") (emphasis added); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 884 P.2d 920, 930-31 (Wash. 1994) (rejecting argument that "compliance with design specifications in accord with *Boyle* gives rise to the common law defense as to any failure-to-warn claim," and holding that "the defense applies in the case of a failure-to-warn claim only if there are precise government specifications pertaining to warnings"). *See also Feldman v. Kohler Co.*, 918 S.W.2d 615, 627 (Tex. Ct. App. 1996) (finding no "significant conflict between Texas' failure to warn tort law, and the requirements imposed by the government" contract because "there is no showing that warnings of a particular sort were either required or prohibited"); *Jackson v. Deft, Inc.*, 273 Cal. Rptr. 214, 221 (Ct. App. 1990) (holding that the "evidence did not establish as a matter of law the necessary significant conflict between federal contracting requirements and state law" because although "certain warnings were required by the military specifications, ... the specifications [did not] place[] any limitation on additional information from the manufacturers to users of their products"), *review denied*, 1990 Cal. LEXIS 5536 (Cal. Dec. 12, 1990).

f. These varying standards for application of the government contractor defense pose important and practical dilemmas that require resolution by this Court. First, imposition of state tort liability on government contractors for failing to warn users of dangers inherent in military equipment manufactured in accordance with government specifications risks disrupting the Armed Forces. A proliferation of multiple, inconsistent, state-mandated warnings to members of the armed forces could contradict the orders of military superiors. This is especially true

where, as here, the state courts do not require a finding as to what would constitute a sufficient warning, or a finding that any warning would have been heeded given the Navy's total control over the work schedules and working conditions of its personnel in wartime. App. 34a ("It wasn't like a regular job. It wasn't a union."). At the very least, such a cacophony of cautionary warnings would be inimical to good order and discipline. *See Emory*, 148 F.3d at 352 ("Indeed, when the Navy possesses the same knowledge as its contractor, a requirement that the contractor provide additional warnings to individual pilots risks disruption of the chain of command. A contractor cannot be forced to provide warnings to officers that would contradict orders received from their superiors."). This Court has frequently recognized the importance of discipline and instinctive obedience in the military. For example, in *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986), the Court observed that:

> [W]e have repeatedly held that "the military is, by necessity a specialized society separate from civilian society." ... "[The] military must insist upon a respect for duty and a discipline without counterpart in civilian life," ... in order to prepare for and perform its vital role.... The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.... The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

(Citations omitted).

Finally, this case provides an opportunity to address fundamental issues of federalism in a critical national context. A telling reflection of the centrality of such issues to our constitutional framework is this Court's growing docket of Supremacy Clause preemption cases.[5] Granting review in this case would add a dimension to the Court's current consideration of federalism issues and allow the Court to speak in a broader context than the cases currently pending.

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5 The currently pending preemption cases in which this Court has granted review are: *Natsios v. National Foreign Trade Council*, No. 99-474 (whether Massachusetts law preventing state agencies from contracting with companies that do business in Myanmar is preempted by foreign affairs power of the national government); *Norfolk Southern Railway v. Shanklin*, No. 99-312 (whether state law claims of negligence based on inadequate warning devices at railway grade crossing are preempted where warning devices at crossing were installed with federal funds under a project approved by the federal government); *Geier v. American Honda Motor Co., Inc.*, No. 98-1811 (whether state common law claims that an automobile was defectively designed because it lacked airbags are preempted where automobile manufacturer complied with federal motor vehicle safety standards that permit, but do not require, installation of airbags in passenger vehicles); *International Ass'n of Independent Tanker Owners (INTERTANKO) v. Locke*, No. 98-1706 (whether Washington law prescribing comprehensive standards for oil tankers is preempted by federal statutes, regulations, and international treaty commitments that prescribe different standards and requirements governing the same subject matters); *United States v. Locke*, No. 98-1701 (same).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 1999

APPENDIX

APPENDIX A

Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, dated December 29, 1998

Lerner, P.J., Wallach, Tom, Andrias, JJ.

3219-
3220-
3221-
3222-
3223 In re: New York City Asbestos Litigation

Elaine Ronsini, etc.,
Plaintiff-Respondent-Appellant,
Alani Golanski

-against-

Garlock, Inc., et al.,
Defendants,

-and-

Worthington Corporation, et al.,
Defendants-Appellants-Respondents,
Jerrold J. Ganzfried
Roger P. McTiernan

Argentina Cardinal, etc.,
Plaintiff-Respondent-Appellant,
Alani Golanski

-against-

Garlock, Inc., et al.,
Defendants,

John Crane, Inc.,
Defendant-Appellant-Respondent,
William E. Fay, III

Judgments, Supreme Court, New York County (Karla Moskowitz, J.), entered September 8, 1997, to the extent appealed from, awarding the Ronsini plaintiff damages against Worthington Corporation and Atlas Turner, Inc., and awarding the Cardinal plaintiff damages against John Crane, Inc., and bringing up for review three separate orders, same court and Justice, entered on or about June 4, 1997, which, inter alia, denied defendants' motions to dismiss the complaints or, in the alternative, to set aside the verdicts and direct a new trial, unanimously affirmed, without costs. Appeals from the aforesaid orders unanimously dismissed, without costs, as subsumed in the appeals from the judgments. Plaintiffs' appeals, unanimously dismissed, without costs, as abandoned.

In these consolidated actions to recover for mesothelioma caused by exposure to asbestos, viewing the evidence in the light most favorable to the prevailing plaintiffs (Elkins v Ferencz, ___AD2d___, 677 NYS2d 342), we find that the evidence was sufficient for the jury to identify that defendant Worthington's product contained asbestos components that caused Mr. Ronsini's injury. There was evidence that the specifications for the Worthington component required that it supply enough replacement parts for there to be Worthington components still in use at the time of Mr. Ronsini's exposure, and it was reasonable to infer that such parts had in fact been supplied and used. It is therefore unnecessary to reach this defendant's argument that it is not responsible for replacement parts manufactured or supplied by others. Nor was the jury's determination against

the weight of the evidence (Lolik v Big V Supermarket, 86 NY2d 744, 746).

In the absence of any evidence of a conflict between State warning requirements and any Federal prescription of label information or proscription of a warning, there was no basis for Worthington's requested government contractor defense charge (see, In re "Agent Orange" Producer Liability Litigation, 996 F2d 1425, 1436, cert denied 510 US 1140; Russek v Unisys Corp., 921 F. Supp 1277, 1292). Nor did this defendant carry its heavy burden of showing that the Navy's failure to warn Mr. Ronsini was so extraordinary and unforeseeable that it broke the chain of proximate causation (see, Pagowski v Martinez, 197 AD2d 400).

The determination that Atlas Turner components contributed to Mr. Ronsini's injury was based upon sufficient evidence and a fair interpretation of the evidence. In addition to Mr. Ronsini's testimony that he saw a 50-60 pound bag with the name "Atlas", he testified that Atlas's cement insulation was the only such product that he remembers being used on board the ship where he worked and another seaman testified to similar effect, thus distinguishing the instant situation from those in which the person identifying the product did not see an open bag of the subject product or know that its contents had actually been used (cf., Cawein v The Flintkote Co., 203 AD2d 105; Diel v The Flintkote Co., 204 AD2d 53; see also, In re New York Asbestos Litigation, 212 AD2d 463). Assuming arguendo that the trial court erroneously excluded evidence tending to show the existence of similarly-named entities that may have produced asbestos components, any such error did not influence the verdict because this evidence would have been cumulative of testimony that Atlas Turner did not sell its insulting cement in this country and was prohibited by statute from doing so.

The jury determination that asbestos particles were released by Mr. Cardinal's work as a pipefitter also had a rational basis and was not against the weight of the evidence, inasmuch as the jury merely acted within its province in resolving conflicting testimony on this issue.

Admission of the testimony of the late-noticed expert witnesses was not an improvident exercise of discretion in view of the failure to show that the failure to identify them was either willful or prejudicial (Flour City Architectural Metals v Sky-Lift Corp., 242 AD2d 471). Nor was there any error in preclusion of the settling defendants' interrogatories (see, State Univ Constr. Fund v Kipphut & Neuman Co., 159 AD2d 1003).

The claimed verdict sheet error is unpreserved (Vavosa v Stiles, 220 AD2d 363, 364), and there was no evidence that the jury was confused by the charge on proximate cause (cf., Aragon v A & L Refrig. Corp., 209 AD2d 268), which we find to have been adequate. The comments by plaintiff's counsel now complained of were either the subject of prompt and appropriate curative instructions (see, Mena v New York City Tr. Auth., 238 AD2d 159, 160) or unpreserved (see, Figueroa v Maternity Infant Care Family Planning Project, 243 AD2d 424, lv denied 91 NY2d 807).

As to the challenge of defendant John Crane, Inc. to the apportionment of 30% liability against it, this defendant has not carried its burden of demonstrating the amounts of the equitable shares attributable to the settling defendants (see, Bigelow v Acands, Inc., 196 AD2d 436; Zalinka v Owens-Corning Fiberglass Corp., 221 AD2d 830, 831), and we decline to disturb the jury's determination as to this, and as to the other, apportionments. Under the circumstances, we find that none of the awards, as reduced by the trial court,

deviate from what is reasonable compensation under the circumstances.

We have considered defendants' other contentions and find them to be unavailing.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 29, 1998

/s/ Catherine O. Wolfe
CLERK

APPENDIX B

Decision and Order of the Supreme Court of New York, dated May 20, 1997

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : IAS PART 26

IN RE: NEW YORK ASBESTOS LITIGATION

FRANK RONSINI,

Index No. 108809/96

Plaintiff,

-against-

GARLOCK, ET AL. **DECISION AND ORDER**

Defendant.

MOSKOWITZ, KARLA, J.S.C.

In this group of mesothalioma "extremis" cases, defendant Worthington moves, after phase I and phase II trials, pursuant to CPLR 4404, for renewal of its trial motions for dismissal, to set aside the verdict as against the weight of the evidence, in the interests of justice and, alternatively, for

a new trial on all grounds and to vacate the phase I damages award of the trial as grossly excessive.

The jury reached a verdict in phase I on December 5, 1996 and in phase II on December 26, 1996.

Courts are reluctant to interfere with jury verdicts unless damages are clearly excessive or a verdict is not supported by the evidence.

Here, Worthington's primary argument is that plaintiff failed to prove that any asbestos supplied by Worthington was inhaled by Mr. Ronsini. Worthington's attorneys argued vigorously on this issue as well as the others now raised during trial and I find no reason to change the rulings I made then. The primary issue was left for the trier of fact. The jury unanimously found for the plaintiff and had sufficient competent evidence before it that plaintiff Frank Ronsini was occupationally exposed to defendant Worthington's products; that its asbestos-containing products were defective and they were a proximate cause of Mr. Ronsini's injuries. The jury thus credited Frank Ronsini's testimony that he was the only one who could work the Worthington air compressor and how the pumps and gaskets needed removing, scraping and chipping and the dust created.

I believe that I did not commit any error in excluding or including evidence, expert or other, or in charging the jury. The issues Worthington raises, including the "Navy" defense, require no further discussion except for the jury's finding of recklessness.

The New York State Court of Appeals has just handed down a decision affirming lower courts' decisions setting aside juries' findings of reckless disregard for workers' safety and assessments of punitive damages. In the Matter of New York City Asbestos Litig.: Amelia Maltese et

al v Westinghouse Elec. Corp.; Savino Stallone et al v Westinghouse Elec. Corp.; (and another action), ___ NY2d ____, NYLJ, Feb. 13, 1997, at 27, col 4. In affirming, the Court defined the level of conduct required to support a finding of recklessness or of gross negligence: "'The actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome" (In re N.Y.C. Asbestos Litig., supra). The Court applied that standard and found the evidence insufficient, at most revealing "Westinghouse's general awareness that exposure to high concentrations of asbestos over long periods of time could cause injury, but not that workers such as Maltase or Stallone were at risk at any time it could have warned them." Id.

In this action, although plaintiff introduced evidence of Worthington's involvement in the heating and ventilation industry and placement of ads in the industry's magazine at the relevant time period, that is too circumstantial to support a finding of recklessness. There is no evidence in the record that Worthington knew of the risk of the asbestos containing product the jury found that Frank Ronsini used to workers like him so that Worthington "could have warned him." Therefore, the jury's finding of recklessness is set aside as speculative.

Defendant Worthington also moves to reduce the jury's 11% apportionment against Worthington in phase II. While various arguments are made about Ronsini's exposure to Worthington's product as opposed to similar products, plaintiff placed sufficient evidence before the jury for it to conclude, as it did, that 11% was the appropriate percentage of contribution. Thus, I decline to disturb the percentage.

Defendant Worthington questions its responsibility for the bankrupt shares. The issue of what, if any, responsibility the non-settling defendants bear for the bankrupts – Manville and GAF – is controlled by the decision in In re Brooklyn Navy Yard Asbestos Litig., 971 F2d 831 (2nd Cir. 1992), Article 16 of the CPLR and GOL § 15-108.

If the jury's finding of recklessness had stood, defendant Atlas Turner would have been liable for those shares. CPLR 1602(7).

Because I have set aside the jury's finding of recklessness, CPLR 1602(7) precludes joint and several liability for non-economic loss.

However, CPLR 1601(1) states the following as relevant:

> "Limited liability of persons jointly liable
>
> 1. Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss; provided, however that the culpable conduct of any person not a

party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state).

2. Nothing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law." [Underlining added].

Decisional law places a bankrupt party within this definition because, "although it [a bankrupt] is subject to suits, the automatic stay precludes processing a claim against [it]" (In re Brooklyn Navy Yard Asbestos Litig., supra, at 846. Thus, the total shares of fault the jury attributed to the bankrupts – Manville and GAF – cannot be subtracted from the total liability in determining the equitable shares for non-economic loss of non-settling defendants Atlas Turner and Worthington.

Atlas Turner also moves to reduce the jury's verdict in phase I as excessive. The jury awarded four million dollars ($4,000,000) for pain and suffering to date and two million, five hundred thousand dollars ($2,500,000) for six months of future pain and suffering. The jury also calculated future lost earnings over 23 years at two million dollars ($2,000,000).

Atlas Turner contends that one million, two hundred thousand dollars ($1,200,000) for past and three hundred thousand ($300,000) for future pain and suffering are adequate.

I have reduced awards in other mesothelioma actions and do so here so that the verdict is consistent with other

decisions in this jurisdiction. Thus, the award for past pain and suffering is reduced from four million dollars ($4,000,000) to three million, five hundred thousand dollars ($3,500,000) and for future pain and suffering from two million, five hundred thousand dollars ($2,500,000) to one million, five hundred thousand dollars ($1,500,000). Thus, Frank Ronsini is relatively young (46 years), was in otherwise excellent health, had strong employment prospects and a previous vigorous lifestyle. Mr. Ronsini's testimony (by videotape) showed a strong, articulate man who was fully aware of what he had already been through and would have to endure in the future. He had symptoms of the disease beginning in November, 1994. By the time of trial, he had fought the disease for more than two years, a relatively long time, and undergone several procedures. The jury had ample basis to make its awards, as reduced. The awards deviate from reasonable compensation only to the extent found. The awards, as reduced, for pain and suffering do not materially deviate from reasonable compensation for this disease for this length of time for such a relatively young man. In addition, there was support in the record for the award of future lost wages based on Dr. Tinari's evaluation.

I have considered the remainder of Atlas Turner's contentions and they are denied.

To summarize, defendant's motion is granted to the extent of striking the jury's finding of recklessness in phase II. The damages in phase I are reduced as directed and the motion is otherwise denied. The parties are directed to serve and submit any proposed judgments to Part 26 by June 20, 1997 and counter judgments by June 27, 1997. Attorneys are to appear in IA Part 26 for a hearing on any contested issues concerning the molding of the judgment on July 10, 1997 at 2:00 PM.

The foregoing is the order of the Court.

Copies to all counsel before filing and entry.

Dated: 5/20/97

/s/ Karla Moskowitz
KARLA MOSKOWITZ, J.S.C.

APPENDIX C

Verdict Sheet, Supreme Court of the State of New York

[reprinted in CA App. 746-753]

A 746

Exhibit C, Ronsini Damages Verdict Sheet
(pages A746 through A747)

Justice Karla Moskowitz
IAS Part 26

December, 1996

FRANK RONSINI CASE, INDEX NO. 108809/96

Questions for the Jury

1. State the amount, if any, awarded to FRANK RONSINI for pain and suffering up to the date of your verdict.

$ 4,000,000

Dissenting Juror (if any) _____

2. State the amount, if any, awarded to FRANK RONSINI for future pain and suffering.

$ 2,500,000

over 6 months

Dissenting Juror (if any) 1, #6

3. Set forth the amount awarded for lost earnings up to the date of your verdict.

$ 80,182

Dissenting Juror (if any) _____

4. Set forth the amount awarded for future lost earnings from the date of your verdict until he could be expected to stop working.

$ 2,200,000

over 23 years

Dissenting Juror (if any) _____

A 747

5. Set forth the amount awarded for past unreimbursed medical and ancillary expenses.

$ 25,000

Dissenting Juror (if any) _____

Notify Court Officer you have reached a verdict.

F

Jurors Signatures:

_____ Juror 1

_____ Juror 2

_____ Juror 3

_____ Juror 4

_____ Juror 5

_____ Juror 6

[redacted]

A 748

Exhibit D, Ronsini Liability Verdict Sheet

(pages A748 through A753)

Justice Karla Moskowitz
IAS Part 26

December, 1996

FRANK RONSINI CASE, INDEX NO. 108809/96

Questions for the Jury

1a. Was FRANK RONSINI occupationally exposed to any asbestos-containing products manufactured, distributed or sold by Atlas Turner Inc.?

Yes ✓ No _____

Dissenting Juror (if any) NONE

If your answer is "No", skip to 2a.

1b. If you answered "YES", were the asbestos-containing products of Atlas Turner Inc. defective because of lack of warnings?

Yes ✓ No _____

Dissenting Juror (if any) NONE

If your answer is "No", skip to 2a.

1c. If you answered "YES", were Atlas Turner Inc.'s asbestos-containing defective products a proximate cause of FRANK RONSINI's injuries?

Yes ✓ No _____

Dissenting Juror (if any) NONE

Answer the next question.

2a. Was FRANK RONSINI occupationally exposed to any asbestos-containing products manufactured, distributed or sold by Worthington Corporation?

Yes ✓ No _____

Dissenting Juror (if any) NONE

If your answer is "No", and answered "NO" to either 1a, 1b or 1c, go no further.

A 749

2b. If you answered "YES" to 2a., were the asbestos-containing products of Worthington Corporation defective because of lack of warnings?

Yes ✓ No _____

Dissenting Juror (if any) None

If your answer is "No", and answered "NO" to either 1a, 1b or 1c, go no further.

2c. If you answered "YES" to 2b., was the failure to warn by Worthington Corporation's asbestos-containing defective products a proximate cause of FRANK RONSINI's injuries?

Yes ✓ No _____

Dissenting Juror (if any) None

If your answer is "No", and answered "NO" to either 1a, 1b or 1c, go no further.

3. If you answered "YES", was FRANK RONSINI exposed to any asbestos-containing products manufactured, distributed or sold by any of the following companies?

If your answer is "Yes", check Box 3a. next to company name below.

Dissenting Juror (if any) _____

Company	3a. Exposed	3b. Failure to Warn	3c. Proximate Cause
Eagle Pitcher	✓	✓	✓
H. K. Porter	✓	✓	✓
Johns Manville Corp.	✓	✓	✓
Keasbey & Mattison	—	—	—
Keene Corp.	✓	✓	✓
Nicolet Industries Inc.	✓	✓	✓
Philip Carey Mfg. Co.	✓	✓	✓
Unarco Industries	✓	✓	✓

A 750

3b. For each company as to which you checked off Box 3a. above in answer to Question 3, were the asbestos-containing products of the company defective because of lack of warnings?

If your answer is "Yes", check Box 3b. next to company name above.

Dissenting Juror (if any) None

3c. For each company as to which you checked off Box 3a. and 3b. in answer to Questions 3a. and 3b., was the company's asbestos-containing defective products a proximate cause of injury to FRANK RONSINI?

If your answer is "Yes", check Box 3c. next to company name above.

Dissenting Juror (if any) None

4. If you answered "YES", was FRANK RONSINI exposed to any asbestos-containing products manufactured, distributed or sold by any of the following companies?

If your answer is "Yes", check Box 4a. next to company name below.

Dissenting Juror (if any) None

Company	4a. Exposed	4b. Failure to Warn	4c. Proximate Cause
Armstrong Cork & Seal Co.Inc.	✓	✓	✓
Detroit Diesel Corporation / General Motors Corporation	✓	✓	✓
Fiberboard Corporation	✓	✓	✓
GAF Corporation / Ruberoid	✓	✓	✓
Garlock, Inc.	✓	✓	✓
General Electric Co.	✓	✓	✓
Gould Pumps Inc.	✓	✓	✓
IMO Industries, Inc. / Delaval	✓	✓	✓

A 751

Ingersoll Rand Company	✓	✓	✓
Owens-Corning Fiberglass Corp.	✓	✓	✓
Pittsburgh Corning Corp. (Unibestos)	✓	✓	✓
Raybestos Manhattan Inc.	✓	✓	✓
The Anchor Packing Co.	✓	✓	✓
Volkswagen of America Inc. / Volkswagen AG	✓	✓	✓

4b. For each company as to which you checked off Box 4a. above in answer to Question 4, were the asbestos-containing products of the company defective because of lack of warnings?

If your answer is "Yes", check Box 4b. next to company name above.

Dissenting Juror (if any) N/A

4c. For each company as to which you checked off Box 4a. and 4b. in answer to Questions 4a. and 4b., was the company's asbestos-containing defective products a proximate cause of injury to FRANK RONSINI?

If your answer is "Yes", check Box 4c. next to company name above.

Dissenting Juror (if any) N/A

5. For defendant Atlas Turner Inc., Worthington Corporation and for each of the companies for which you checked all three boxes in answer to Questions 3a., 3b., 3c., 4a., 4b. and 4c., state the percentage of responsibility that that company bears for FRANK RONSINI's injury. The percentages must total 100%.

Company	Percentage
Atlas Turner Inc.	12 %
Worthington Corporation	11 %
Armstrong Cork & Seal Co.Inc.	3.5 %
Detroit Diesel Corporation / General Motors Corporation	3 %

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Eagle Pitcher	3 %
Fiberboard Corporation	2.5 %
GAF Corporation / Ruberoid	3 %
Garlock, Inc.	5 %
General Electric Co.	2.5 %
Gould Pumps Inc.	4.5 %
H. K. Porter	4.5 %
IMO Industries, Inc. / Delaval	4 %
Ingersoll Rand Company	4 %
Johns Manville Corp.	4 %
Keasbey & Mattison	0 %
Keene Corp.	3 %
Nicolet Industries Inc.	2.5 %
Owens-Corning Fiberglass Corp.	4 %
Philip Carey Mfg. Co.	3 %
Pittsburgh Corning Corp. (Unibestos)	3.5 %
Raybestos Manhattan Inc.	4 %
The Anchor Packing Co.	4 %
Unarco Industries	3 %
Volkswagen of America Inc. / Volkswagen AG	6.5 %
TOTAL:	100 %

Dissenting Juror (if any) NONE

6. Was the conduct of Atlas Turner Inc. reckless with respect to the failure to warn?

Yes ✓ No_____

Dissenting Juror (if any) NONE

A 753

7. Was the conduct of Worthington Corporation reckless with respect to the failure to warn?

Yes ✓ No _____

Dissenting Juror (if any) N/A

Notify Court Officer you have reached a verdict.

Jurors Signatures:

_____ Juror 1

_____ Juror 2

_____ Juror 3

_____ Juror 4

_____ Juror 5

_____ Juror 6

APPENDIX D

Judgment of the Supreme Court of New York, dated September 8, 1997

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
IN RE: NEW YORK CITY ASBESTOS
LITIGATION
----------X
THIS DOCUMENT RELATES TO

Index No.: 108809-96

ELAINE RONSINI. Executrix of the Estate of FRANK RONSINI.

Plaintiff,

-against-

Assigned To Hon. Karla Moskowitz

JUDGMENT

GARLOCK, INC., H&A CONSTRUCTION; ASBESTOSPRAY CORP; ROBERT A. KEASBEY CO.; COMBUSTION ENGINEERING, INC., U.S. MINERAL PRODUCTS, CO.; OWENS-CORNING FIBERGLAS, CORP; ROCKWOOL MANUFACTURING CO.; THE ANCHOR PACKING COMPANY; FOSTER WHEELER ENERGY CORP.; PITTSBURGH-CORNING CORP.; RAPID-AMERICAN CORPORATION as successor-in-interest to Phillip Carey Manufacturing Corp.; JOHN CRANE, INC.; A.W. CHESTERTON CO., INC.; ATLAS TURNER, INC.; ALLIED CORPORATION as Successor in-interest to The Bendix Corporation; WESTINGHOUSE ELECTRIC CORPORATION; WESTINGHOUSE ELECTRIC CORPORATION; WORTHINGTON

CORPORATION; RUTLAND FIRE CLAY COMPANY d/b/a Rutland Products; GENERAL ELECTRIC COMPANY; UNIROYAL, INC., IMO INDUSTRIES, INC. as successor to and formally known as Delaval Turbine, Transamerica Delaval and IMO Delaval; YORK INDUSTRIES CORPORATION; STANDARD INSULATION COMPANY; CROWN CORK & SEAL CO., INC.; INGERSOLL-RAND COMPANY; GOULD PUMPS, INC.; QUAKER CHEMICAL CORPORATION; SELBY BATTERSBY & COMPANY; GENERAL MOTORS CORPORATION; DETROIT DIESEL CORP. as successor to Detroit Diesel Allison Division of General Motors; VOLKSWAGEN OF AMERICA, INC., WW VENTURE CORPORATION, formerly known as or as successor to WORLD WIDE VOLKSWAGEN CORPORATION; VOLKSWAGEN WERK AKTIENGESELLSCHAFT, RAYMARK INDUSTRIES, INC.

Defendants.

----------X

PITTSBURGH CORNING CORPORATION,

INDEX NO. 591585

Third-Party Plaintiff,

-against-

AP GREEN INDUSTRIES, INC., ABEX CORPORATION; ARMSTRONG WORLD INDUSTRIES, INC., GAF CORPORATION; GENERAL REFRACTORIES COMPANY, INC.; HARBISON WALKER REFRACTORIES, NORTH AMERICAN REFRACTORIES COMPANY; PLIBRICO SALES & SERVICE COMPANY, UNITED STATES GYPSUM CO., VOLKSWAGEN OF AMERICA, INC.; THOMAS

O'CONNOR & COMPANY, INC.; AMERICAN PREMIER, INC.,

Third-Party Defendants.

RAPID AMERICAN CORPORATION, INDEX NO. 591496

Third-Party Plaintiff,

-against-

RAYMARK INDUSTRIES, INC.,

Third-Party Defendants.

OWENS CORNING CORPORATION, INDEX NO. 591585

Third-Party Defendants.

-against-

ARMSTRONG WORLD INDUSTRIES, INC., formerly Armstrong Cork Company and Armstrong Contracting and Supply; TURNER & NEWALL, INC., individually and as successor to Turner & Newall PLC, and as alter ego of Keasbey & Mattison Company and Bel Asbestos Mines, Ltd., GAF CORPORATION, individually and as successor tot he Ruberoid Co. and Vermont Asbestos Corporation; BENJAMIN FOSTER, INC.; EASTERN REFRACTORIES, INC., and RAYMARK INDUSTRIES, INC., individually and as successor to Raybestos Manhattan, Inc.,

Third-Party Defendants.

WHEREAS, plaintiff Frank Ronsini, having settled and discontinued this personal injury action against A.W. Chesterton, Foster Wheeler Corporation, Garlock, Inc., The Anchor Packing Company, Combustion Engineering, Inc.,

IMO Industries, Inc., General Electric Corporation, Ingersoll-Rand Company, Crown Cork & Seal Co., Inc., Rapid American Corporation, Gould Pumos, Inc., Pittsburgh Corning Corp., Allied Signal Corporation, Uniroyal, Inc., General Motors Corp. (for Detroit Diesel Corp.). Owens-Corning Fiberglas Corp., Volkswagen of America, Inc., W.W. Venture Corp., and Volkswagen Werk Aktien-Gesellschaft:

AND, the action against the defendant, Rockwool Manufacturing Co. and Standard Insulation Co. having been stayed due to said defendants' bankruptcy:

AND, the Court having dismissed plaintiff's action against Selby Battersby & Company, Quaker Chemical Corporation, Westinghouse Electric Corporation, and John Crane, Inc., Rutland Fire & Clay Company, and York Industries Corporation:

AND, a Stipulation of Dismissal having been filed in plaintiff's action against H&A Construction, Asbestospray Corp., Robert A. Keasbey Co., U.S. Mineral Products Co., and Empire Ace Insulation Co.;

AND, the trial of this action having proceeded against ATLAS TURNER INC., and WORTHINGTON CORPORATION;

AND, the issues in the above entitled action having duly come on for trial before the Hon. Karla Moskowitz, a Justice of this Court, and a jury, at a Special Term, Part 26 of this Court held at the courthouse thereof, located at 60 Centre Street on or about the 12th day of November, 1996, the plaintiff, FRANK RONSINI, having duly appeared by his attorneys, Levy, Phillips & Konigsberg, L.L.P., and the defendant Atlas Turner, Inc., by its attorneys Barry, McTiernan & Moore, and the defendant Worthington

Corporation by its attorneys Costello. Shea & Gaffney and the issues having been duly tried and the jury on the 25th day of December, 1996 having found defendants ATLAS TURNER, INC. and WORTHINGTON CORPORATION, jointly and severally liable for compensatory damages and having rendered a compensatory damage award in favor of the plaintiff in the sum of Eight Million Eight Hundred Five Thousand One Hundred Eighty Two ($8,805,182) Dollars against defendants ATLAS TURNER INC. and WORTHINGTON CORPORATION and the jury having apportioned the equitable share of the damages pursuant to the General Obligations Law § 15-108, as set forth in the Special Verdict Form;

AND, upon consideration of motions by the parties, the Court issued a Decision and Order dated May 20, 1997 reducing the past and future pain and suffering amounts to $3,500,000 (from $4,000,000) and $1,500,000 (from $2,500,000) respectively and further striking the jury's finding of recklessness, thus yielding a total reduced verdict of $7,305,182;

IT IS NOW, ORDERED, ADJUDGED AND DECREED that the Judgment rendered in this action dated August 15, 1997 is hereby withdrawn and rescinded:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims against all defendants, third-party defendants and other like parties except defendants Worthington Corporation and Atlas Turner, Inc. are hereby severed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, Elaine Ronsini, as Executrix for the Estate of Frank Ronsini, residing at 9 Chestnut Street, Cornwall, New York 12518, has judgment severally against defendant Worthington Corporation (2001 Ross Avenue,

Dallas Texas 75201) only for non-economic damages in the lump sum of Seven Hundred Forty-Eight Thousand ($748,000) Dollars, plus post-verdict interest as accumulated from December 26, 1996 to entry of judgment in accordance with C.P.L.R. §5002, 5004 in the sum of _____ ($37,145.88) Dollars, making in all the sum of $785,145.88 (_____) Dollars that the plaintiff has execution severally against defendant Worthington Corporation thereof and:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Elaine Ronsini, Executrix of the Estate of Frank Ronsini, has judgment severally against defendant Atlas Turner, Inc. (854 Boulevard, Quellet West, Thetford Mines Quebec G6G785) only, for non-economic damages in the lump sum of Eight Hundred Sixteen Thousand Five Hundred ($816,500) Dollars, plus post verdict interest which has accumulated from December 26, 1996 to entry of Judgment in the sum of $40,547.62 (_____) Dollars, making in all the sum of $857,047.62 (_____) Dollars that the plaintiff has execution severally against defendant Atlas Turner, Inc. thereof and;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that plaintiff Elaine Ronsini, Executrix of the Estate of Frank Ronsini further has judgment against defendants Atlas Turner, Inc. and Worthington Corporation jointly and severally as follows:

a) Five Hundred Forty One Thousand Thirty-Four ($541,034) Dollars in a lump sum plus post-verdict interest accumulating from December 26, 1996 to entry of judgment in accordance with C.P.L.R. § 5002, 5004, in the sum of ($34,151.84) Dollars, plus costs and disbursements as taxed in the sum of $4440.50 (_____) Dollars, plus post-verdict interest on the present value of the annuity contract ($471,099) accumulating from December 16, 1996 to entry

of judgment in accordance with C.P.L.R. § 5002, 5004, in the sum of ($29,737.32) Dollars, making in all the sum of $609,363.66 (_____) Dollars that the plaintiffs has execution jointly and severally against defendants Atlas Turner, Inc. and Worthington Corporation thereof;

b) Defendants (or their insurance carriers) are directed to purchase an annuity contract – the present value of which is deemed to be $471,099 (which will reflect the provisions of C.P.L.R. § 5035 and a copy of which shall be provided to plaintiff's attorney), issued by a qualified insurer, approved and designated as qualified by New York's Superintendent of Insurance – to be approved by the Court, which will provide for annual payments in equal monthly installments, in advance to the plaintiff starting at $26,876 per year for 23 years, increased annually at 4% compounded annually, and it is further.

Judgement signed this 8 day of Sept, 1997

/s/ Karla Moskowitz
KARLA MOSKOWITZ, J.S.C.

/s/
CLERK

APPENDIX E

Order of the Supreme Court of the State of New York, Appellate Division, First Department, denying Worthington Corporation's Motion for Reargument or Leave to Appeal, dated May 18, 1999

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 18, 1999

Present – Hon. Richard W. Wallach Justice Presiding
Alfred D. Lerner
Peter Tom
Richard T. Andrias Justices.

In re: New York City Asbestos Litigation

Elaine Ronsini, etc.,
Plaintiff-Respondent-Appellant,
-against-

Garlock, Inc., et al.,
Defendants,

-and-

Worthington Corporation, et al.,
Defendants-Appellants-Respondents,

Argentina Cardinal, etc.,
Plaintiff-Respondent-Appellant,

-against- Index #108440/96

Garlock, Inc., et al.,

Defendants,

John Crane, Inc.,
Defendant-Appellant-Respondent.

Defendants-appellants, Worthington Corporation, John Crane, and Atlas Turner, Inc., having separately moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals from, the decision and order of this Court entered on December 29, 1998 [Appeal Nos. 3219-3220-3221-3222-3223],

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon,

It is ordered that the motions be and the same hereby are denied in their entirety.

ENTER:

/s/ Catherine O. Wolfe
Clerk

APPENDIX F

Decision of the State of New York Court of Appeals, denying Worthington Corporation's Motion for Leave to Appeal to the Court of Appeals, dated September 16, 1999

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of September 1999

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

1-10 Mo. No. 784
In the Matter of New York City
Asbestos Litigation

Elaine Ronsini, &c.,
Respondent,

v.

Garlock, Inc., et al.,
Defendants,
and Worthington Corporation,
Appellant,
and Atlas Turner, Inc.,
Respondent.

(And another action.)

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the

part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/ Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX G

Provisions of the Constitution of the United States of America

---

Article I, Section 8, Clauses 1, 12-14:

The Congress shall have the Power…

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

Article II, Section 2, Clause 1:

The President shall be Commander in Chief of the Army and navy of the United States…

Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX H

Excerpts From the Trial Testimony of Frank Ronsini (November 1, 1996)

[reprinted in Plaintiff's CA App. 157-159]

Q. Did there ever come a time when you were in the engine room on either the Weeks or the Gearing where you would actually try to get to a vent so that you could breathe better?

A. Yes.

Q. Why was that, sir?

A. Because the temperature was so high.

Q. And did you ever try to get some fresh air and just get out of the engine room; or you couldn't do that?

A. I don't think anybody ever ran out of the engine room.

Q. Is that because you were assigned there by the officer and you were expected to be below deck?

A. I would think so.

Q. Was there any kind of air conditioning on the ship, because you mentioned that you did some work on air conditioning?

A. Yes, there was.

Q. Was that air conditioning in the engine room?

A. No.

Q. Where was the air conditioning that you worked on?

A. Officers' quarters.

Q. So the engine room was never air conditioned on either ship?

A. No, sir.

Q. Now, the air conditioning work you did, did that bring you into contact with any type of asbestos?

A. Not that I can remember.

Q. What about ducts or pipes, duct work, things like that? Was that covered with any type of asbestos material?

MR. BILLIG: Objection.

THE WITNESS: The ducting work, I don't remember; but I myself did not do work on the ducting work.

BY MR. REICH:

Q. Did you ever complain to anyone in the Navy about any of these dust conditions?

A. No.

Q. Any reason why?

A. It wasn't like a regular job. It wasn't a union.

Q. Now, let me just go back for a moment. The brake dust that, or the dust that you indicate came from the brake jobs you did: Did you ever have that brake dust analyzed?

Did you ever ask an expert or did your lawyer to your knowledge ever have an expert speak to you about what the dust was made of?

MR. KOMITOR: I'm going to object; attorney-client privilege.

MR. REICH: I will rephrase to work product.

MR. KOMITOR: I will object to that question.

BY MR. REICH:

Q. Did you ever personally come to have knowledge as to what this dust was that you were exposed at Xaviers consisted of?

A. Not personally, no.

Q. Did anyone who worked with you as a mechanic ever tell you that they analyzed or had analyzed the dust?

A. No.

APPENDIX I

Excerpts From the Trial Transcript (November-December 1996)

[reprinted in Joint CA App. 743-747]

Castleman - Plaintiff - Cross/Garry

Q. And you've in fact testified as to the state of knowledge of the United States government as to asbestos diseases and the cause of asbestos disease, have you not?

A. Yes. I mean it's a little vague to talk about the United States Government. I mean obviously, the Library of Congress had all the literature, but that doesn't mean anybody in United States Government knew everything in the Library of Congress.

Certainly you know, you testified as of 1919 the IS Bureau of Labor Statistics, published a study that spoke to the dangers of asbestos and the connection between asbestos exposure and disease, correct?

A. Yes.

Q. And the United States government from time to time after 1918, published a variety of different materials that demonstrated the knowledge of the United States government through its various agencies as to the dangers of asbestos and the connection between asbestos and certain disease processes, correct?

A. Right.

Q. And in addition to just the United States government as an entity, through whatever agencies you've devoted a section of your book to, the knowledge that the United States Navy had with respect to the dangers of asbestos and the association between asbestos and certain disease processes, did you not?

A. Yes.

Q. And in fact, in the portion of your book devoted to the United States Navy, you make reference to a publication called Safety Review, occupational health hazards derived -- I'm sorry Safety Review from 1947 volume 4, page 13, January 1947.

Do you recall that?

A. I hope I got the reference right. Yes, I recall it.

Q. And in that particular publication in 1947, is it not correct that the United States Navy, in it's own publication, indicated that activities engaged in the handling of asbestos installation and pipe covering should thoroughly investigate the environmental conditions under which these operations are performed, taking the necessary dust counts and checking existing ventilation facilities to insure that the hazard is being effectively and continuously controlled in those instances where mechanical exhaust ventilation must be supplemented by the wearing of personal protective equipment.

Personnel exposed to such hazards should be furnished the Navy half mask confirming to bureau ships, it goes on to describe the particular personal mask or personal respirator type equipment that the Navy recommended, correct?

A. I think so, yes. I haven't looked at this in awhile, but that sounds like what it would have conveyed.

THE COURT: There is a question about what page this is from that you were reading from.

Counsel, what page are you reading from, for the record, please, and has this document been marked for identification?

MR. GARRY: I'll mark it, your Honor.

THE COURT: Deemed? Are you asking, somebody? K? What are we up to.

MR. GARRY: I think we're up to J on ours.

THE COURT: Deemed J. Deemed.

What page is this.

MR. GARRY: 13 of the safety review, 1947, published by the United States Department of the Navy.

Q. Correct?

A Yes.

Q. So I am correct, doctor, am I not, that the United States Navy, as early as 1947, was aware of the association between asbestos and disease and the need to protect workers in the navy by the use of appropriate ventilation systems, and where appropriate, respiration devices and the appropriate checking of dust levels in the naval work environment, correct?

A. Yes.

MR. GARRY: That's all I have.

CROSS-EXAMINATION

BY MR. McTIERNAN:

Q. Doctor, in respect to your book, was your book written before or after you got your doctorate?

A. It was the same as my doctoral thesis. It was published a few months before the doctoral thesis was accepted by the faculty committee.

Q. And you indicated to one lawyer that a group of plaintiffs' lawyers had in affect been supporting you for the better part of four years while you were doing this work?

A. That's your characterization.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 772-773]

Castleman - by Plaintiff - Recross/Garry

RECROSS-EXAMINATION

BY MR. GARRY:

Q. Dr. Castleman, the Fleischer article from 1943 that you mentioned --

MR. KOMITOR: Objection, your Honor, beyond the scope of redirect.

THE COURT: Overruled.

Q. That was a --

A. A what?

Q. The Fleischer study from 1943?

A. Fleischer study? That was 1946.

Q. I'm sorry, that was published by commission of the United States Navy?

A. Right, but with the disclaimer that it did not represent the opinion of the navy.

Q. But published by commission of the United States Navy, correct?

A. Right.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1118]

Proceedings

THE COURT: It is overruled.

MR. BLUTMAN: 130, 20 to 22. Your Honor --

MR. KOMITOR: I will tell you, Judge, I've told counsel that I am withdrawing my design defect claim, they claim that I didn't have one, so rather than dispute about it, we only have going on failure to warn.

I've withdrawn all the questions that we talked about in terms of the kinds of substitutions, what was available, I took out of Mr. Arsi's deposition.

This I want to keep in because it's still important to know if Mr. Arsi believes to this day whether you even need to substitute asbestos. That's an important question.

That's an important question --

THE COURT: I sustain the objection. Next.

MR. BLUTMAN: 204.

THE COURT: What line?

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1127-1133]

Reading EBT – Ronsini

"Q. All right. Why don't we go back then. What do you recall? What type of equipment do you recall being in the main engine room on the U.S.S. Weeks.

"A. Worthington.

"Q. Right now I am asking you for the type of equipment, not the manufacturer. I will ask you that next.

"A. Type of equipment?

"Q. Yes.

"A. Steam propulsion pumps, turbines, oil separators, oil lubricators, haz mat pumps.

"Q. Can you spell that?

"A. No. Haz mat pumps. They are pumps that produce fresh water for the ship.

"Q. Anything else.

"A. Generators, air compressors, oil separators, steam pipes and valves. That's about all I can think of right now.

"Q. All right. Now, I am going to go back over everything you just named and ask if you recall the manufacturer. We will start with the steam propulsion pumps.

"A. Some of the steam propulsion pumps were manufactured by Worthington, and I believe some were produced by Goulds.

"Q. Do you recall the manufacturers of the turbines.

"A. General Electric and Westinghouse.

"Q. Do you recall the manufacturer of the oil separators.

"A. On the steam propulsion pumps, the name I recall was Worthington.

"Q. Is an oil separator the same as a steam propulsion pump.

"A. Correct.

We go now to -- that ends at page 144, line 10.

We go to page 145, line 2.

"Q. Air compressors.

"A. Ingersoll Rand, Worthington.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1142-1146]

Reading EBT - Ronsini

"Q. Okay. Now, was that a separate turbine from the General Electric and Westinghouse turbines that you mentioned on the ship.

"A. Yes, sir.

"Q. Now you referred to a block material on the Worthington air compressor. Shall we call it air compressor/turbine, would that be fair.

"A. Sure.

"Q. Do you know who supplied the block.

"A. No, sir.

"Q. If you added up all the time you were involved in removing the asbestos containing block from the Worthington air compressor/turbine, how much would that add up to.

"A. How much time I actually consumed on that?

"Q. During your time on the Weeks.

"A. I would have to tell you without --

"Q. You can estimate.

"A. Well, that air compressor gave us the most problems. I don't know if you represent that company.

"Q. Take a wild guess, sir. Just take a wild guess.

"A. Let me put it to you this way. I don't remember how many cylinders they had, but I remember how many cylinders you had. Unfortunately I was the only guy who knew how to work on that thing. I spent quite a bit of time, seriously, on the Worthington air compressor.

Plus, the Worthington air compressor, maybe just to enlighten you, I don't know if you know this, and if I say this and I embarrass you I'm not trying to do that, the Worthington air compressor was a much more complicated air compressor, given the fact that's one of the reasons it broke down more.

And also, too, it was a very important air compressor. It was an air compressor we used to get our fishes off the tubes. It was a torpedo launcher, so it was a very, very important. So we had to make sure there wasn't going to be any problems with it, so I spent a lot of time on it.

"Q. Can you answer my question, though, about the total amount of time you dealt only with the block that you removed from that piece of equipment?

"A. I really couldn't answer that question.

"Q. Would it be a week, more than a week.

"A. I remember working on the Worthington for two or three days in a row, tearing it completely apart, for not the first or second time that we had to do it.

"Q. So two to three days would be a total of how much time you spent with respect to the block.

"A. At one time, yes.

"Q. And on how many occasions would you work on that.

"A. I tore that piece of equipment apart probably three or four times.

Going onto -- that ends at page 166, line 16.

Going onto page 167, line 15.

"Q. Now, your duties specifically with respect to the Worthington oil separators -- by the way, was this a situation like the Ingersoll Rand versus Worthington air compressors, they were in different parts of the engine room or are the DeLavalle and Worthington in the same place.

"A. We had three DeLavalle oil separators. One was in the main engine room, one was in the aft engine room, and one was in the shaft alley of the machine shop. That was for the diesels. I worked on all three of them.

"Q. And I'm sorry. Where were the Worthington oil separators.

"A. Air compressors?

"Q. You mentioned Worthington as a manufacturer of an oil separator earlier, is that correct.

"A. Main and aft engine room.

"Q. So there were two Worthington oil separators is that correct? I don't want to mischaracterize what you said.

"A. In each engine room there was a duplicate of each pump, in each engine room, so if you had one lubricator pump you had two. If you had one condensation pump you had two. The aft engine room had all the same pumps except for different shafts.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1799-1800]

Arsi - Defendant/Worthington - Direct/Garry

Q. Now, you mentioned the marine and Navy department. Is there a separate department for sales to those particular entities?

A. Yes. Both Worthington and Ingersoll-Rand and currently Ingersol-Dresser Pump have always had special departments to handle government and Navy sales because of the advanced and complex technical nature of those particular products to meet government's needs in the contracts that they ask you to bid to.

Q. Is there something different about selling pump equipment for use on naval vessels as opposed to sale for other commercial purposes?

A. Yes. Naval vessels are governed by many military specifications, many government standards. They tend to be more complex than a standard commercial piece of equipment, because the Navy and the government have additional needs you don't find in the commercial world, such as a pump being especially reliable or shockproof for war ships that may have to go to war, in harms way, so these requirements usually require specialists to review those documents and be sure you're in compliance. If you're not in compliance your equipment wouldn't be accepted and you would not be able to supply it.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1814-1815]

Arsi - Defendant/Worthington - Direct/Garry

Q. What portion of your search revealed records, if any?

A. Both the two ships in question, which are the Weeks and the gearing are part of a larger class, the DD692 class and we uncovered that Worthington did, if fact, supply hundreds of pumps to the DD692 class during the war and those pumps were intended to use on the Weeks and the Gearing.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1830-1835]

Arsi - By Defendant Worthington - Direct

MR. GARRY: Dl.

THE COURT: Dl. The next one you are showing the jury will be D2.

Q. Could you describe for the jury what this drawing represents, Mr. Arsi?

A. This is a portion of a very, very long drawing called a plan, which shows me the same cross-sectional picture of the turbine driven main feed pump.

As you can see, it is much more complex than the auxiliary condensate pump. This portion here is the turbine, there is a single long shaft, this portion here is the pump, and by the same analysis of identifying the piece parts and getting the numbers, I can find the packing on the parts lists, which is a further down portion of this same drawing. This packing is number 249, this packing is number 250. I can do the same --

MR. GARRY: I'm showing the jury D3.

A. I can do the same analysis on the list of materials that was applicable to those pumps, and I can come down to 249, packing, 250 packing, six rings, plastic metallic, and get the navy's nomenclature, this is ND, Naval Department specification, it gives a code.

I can go to those Naval Department specifications, look up that code and determine exactly what that has to be.

Q. So which particular piece of equipment was this referable to, Mr. Arsi?

A. This long plan is representative of the turbine driven main feed pump, and on it includes all the piece parts for both the turbine and the pump, and it shows the gasket, which is sheet asbestos, and the navy's identifier, and it shows the packing, which is plastic metallic, and the navy's identifier.

This is a portion of a very long drawing that's about 12 feet long.

Q. Is there anything we have not yet covered?

A. The main condensate pump.

Q. Okay. Could you explain to the jury what this drawing represents and which components you are able to determine were asbestos containing?

A. This is the assembly drawing for the main condensate pump, which is the third and final service. It has the pictorial representation of the pump.

I can find that the packing, in this case number 74, I come over to 74 and find packing ring, quantity, six cotton case plastic metallic, Naval Department specification 33P25, symbol 1433, and a size.

I can also do it for any other piece parts, and you'll see there is a gasket, 1/64th inch thick, one per pump, it's asbestos, and there is the Naval Department specifications, 33P13, symbol 2150.

Does that cover the three categories of equipment that we've discussed?

A. Yes.

THE COURT: Are you finished with the board?

MR. GARRY: Yes.

Q. So if you could, Mr. Arsi, just once again for the jury's benefit recap for these three types of equipment, explain again which they were and which asbestos containing components were on each.

MR. KOMITOR: Objection, your Honor.

THE COURT: Sustained, repetitive.

Q. Other than the gaskets, the split case gaskets on the pumps and the turbines, and the valve packing for the turbines, were there any other asbestos containing components on any of the equipment that Worthington supplied for the Gearing and Weeks?

MR. KOMITOR: Objection.

THE COURT: Overruled.

A. No.

Q. 'Did Worthington have a choice with respect to whether it was to supply asbestos containing components for use on naval vessels?

MR. KOMITOR: Objection, your

Honor.

THE COURT: Sustained.

Members of the jury, disregard that question. You are leading.

Q. Why did Worthington provide asbestos containing components that you identified on the drawings and in the records that you reviewed?

A. These particular pieces of equipment were built to DeLavalle plans and standards. The materials of construction and the design were government issued to us to supply, and the identifying information on the drawings and plans identified asbestos and many other components for the rest of the parts, and that's the way the pumps were built, to be in compliance with the government's contracts.

Q. How did Worthington make a determination as to whether the particular components complied with the government standard?

A. In instances such as these, where the government standard is identified, we would go to the -- something called the QPL, qualified products list, which is a government issued document that will identify the qualified products and manufacturers for the various items that are identified by their standards.

Q. If the government calls for asbestos, can you use something else?

MR. KOMITOR: Objection.

THE COURT: Sustained. Reframe the question.

MR. GARRY: I'll ask another question.

Q. From your review of the records, was the equipment that you have testified about here today designed and built to naval specifications?

A. Yes.

Q. Based on your familiarity with the record keeping procedures of Worthington and its successors, if there had been any additional pump equipment sold for use on these vessels, would there be a record of it at your company?

A. Yes, there would.

Q. And did you make a search for additional records?

A. I did.

Q. Did you find anything?

A. For any specific time frame or forever or --

Q. For sale on this particular class of vessels, which is inclusive of the Weeks and the Gearing.

MR. KOMITOR: Objection.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1901-1905]

Norton - by Defendant Worthington - Direct

Q. What was the purpose of this particular compressor that was sold to the USS Weeks and the USS Gearing class?

A. This was a turbocharger compressor. It was used -- or torpedo compressor, excuse me, to charge bottles to fire torpedoes.

Q. Do you know in or around what time period these compressors were provided to these ships?

A. Yes, this would be in the 1941 to '43 time period.

Q. During World War II?

A. Yes.

Q. The tech manual that you found, the two tech manuals there, is that correct?

A. Yes.

Q. What do they generally tell you in the technical manual?

A. The technical manual is a general description of the compressor. It then details materials, parts and materials in a compressor. It goes through the operation of the compressor, maintenance of the compressor, and then has a bunch of drawings in it actually showing the compressor.

Q. The tech manual, does that have any relationship with the Navy?

A. Yes.

Q. Could you tell the jury how the tech manual and Worthington and the Navy meet with respect to the tech manual?

MR. KOMITOR: Objection.

THE COURT: Could you reframe the question? Sustained.

Q. Can you tell the jury how the tech manual -- strike that.

Is there any policy that the tech manual has to be approved by the Navy?

A. Yes, the tech manuals are approved by the Navy at Bureau of Ships, in particular, I believe in this time frame, and they were supplied with the compressors.

MR. KOMITOR: Could you just read that back?

THE COURT: Read that answer?

MR. KOMITOR: Yes.

THE COURT: Read back the answer.

(Whereupon, the requested portion was read back by the Reporter.)

Q. And the specification of materials, that's contained within the tech manuals?

A. Yes, that's -- there are sections that list material specifications, that's correct.

Q. Would they have to be in compliance with military specifications?

A. Yes, they would.

Q. Now, you indicated to us that the tech manual as part of your search got you to the list of materials?

A. Yes.

Q. Like the one we have up here?

A. That's correct.

Q. Why don't you come down now.

(Whereupon, the witness left the witness stand.)

Q. Now, you indicated to us from this particular exhibit, Exhibit I, the type of destroyer and the class, and that's how you came to the conclusion this included the USS Weeks and the USS Gearing?

A. That's right.

Q. And it indicates where it was built, is that correct?

A. That's correct.

Q. And is there an indication of different types of materials that made up the compressor?

A. Yes.

Q. Those were the parts manufactured by Worthington and parts that were not manufactured by Worthington?

A. That's correct.

Q. Let's get right to the meat of it.

Could you find -- were there asbestos containing gaskets as part of the compressor?

A. Yes, there were.

Q. Was that listed on this list of material?

A. Yes, they would be.

Q. And would this list of material have to have been approved by the government?

A. Yes.

Q. Could you have provided material to the government without having it been approved?

A. No.

Q. Could you get to the area that deals with gaskets? Is that on here?

A. Yes. It's interspersed in here.

Q. Would you take a look and just read the name of the piece of equipment, and we're specifically referring to gaskets, and the type of material and the amount specified, all right, sir?

A. Okay. We have here a piece number 259, it is a gasket for first stage valve cover, there were four required

per compressor. The material was listed as copper asbestos, and the spec was 33G5.

Q. Did we make that?

A. No.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1943-1945]

Merrick - Defendant/Worthington - Direct/Garry

Q. Well, based on your knowledge that you say you've accumulated over the years, was it your understanding that the replacement parts that were put in the compressors, namely the gaskets and packing, would be the same kinds of parts that you originally supplied?

MR. BLUTMAN: Objection.

THE COURT: Overruled.

You may answer.

A. What was supplied as spare parts, would have to match what the original equipment was. There was no spec for it, no mill spec for the material. Military specification.

Q. And it's your understanding that the people at Worthington knew that, correct?

MR. BLUTMAN: Objection.

THE COURT: Sustained.

Members of the jury, disregard that question.

Q. Now, this instruction manual that was marked as Defendant's Exhibit --

THE COURT: Was it marked?

MR. BLUTMAN: Yes.

MR. KOMITOR: May I approach, your Honor?

THE COURT: Yes.

Q. This instruction for the operation and maintenance of turbine driven high pressure air compressors marked as -- you're right, it's been wiped off. Defendant's Exhibit F, I think.

THE COURT: Is it, Counsel?

MR. BLUTMAN: Yes.

THE COURT: And it's in evidence?

MR. BLUTMAN: Yes.

Q. Now, that was a manual, as you said on your direct examination, a service manual that came with the compressor, correct?

A. I said we furnish manuals with compressors, right.

Q. And this was the one that was furnished with your compressor?

A. This one was made by NAVSECPHILA.

Q. This is your service manual, correct?

When I say "you," I mean Worthington's.

MR. BLUTMAN: Objection.

THE COURT: Overruled.

A. We made the original. It was updated by NAVSECPHILA.

Q. I see.

And do you know when this was updated by NAVSECPHILA?

A. I believe it was 1972 time frame.

Q. And did Worthington have any input or role in the updating of the manual, as far as you know?

A. Not that I can say for sure.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 2003-2005]

Merrick - By Defendant Worthington - Direct

Q. Mr. Merrick, you can answer the question about the paper trail. That's fine.

I don't mean to interrupt, but we were in the middle of finding out how you get from specification number to the purchase or replacement part.

A. The manufacturer tells the Navy what is required in the way of spare parts to keep this equipment operating.

Q. When you say the manufacturer tells the Navy what is required in terms of spare parts, are you saying the manufacturer tells the Navy what the specifications for those parts are?

MR. KOMITOR: Objection, leading.

THE COURT: Sustained. Reframe the question.

Q. Who determines what the specifications for the particular part are going to be?

A. The manufacturer tells the Navy what parts are required. The Navy then determines what the specifications are, what the requirements are for each of those parts.

The Navy has issued over the years many thousands of specifications in great detail, telling the

performance requirement for parts and supplies that they want to purchase.

Q. Is there a name for those kinds of documents?

A. They go under the general name of specifications, in this case, material specifications, detailed requirements for individual materials.

When these are published, then manufacturers are invited to submit samples of their products for testing. The testing requirements are called out in each of these material specifications. Every manufacturer whose products are tested and satisfactorily complete the testing are then listed in a qualified products listing associated with that specification.

Again, the numbers cross-reference so that there is a numerical QPL for each specification, and you can call out a material such as a gasket by the military specification, or back in World War II it was a Navy specification, and then go look at the related product listing under the same number and tell who has manufactured products that meet the Navy's requirements for that product.

Q. Have you reviewed any qualified products lists with respect to, for example, asbestos compressed sheet gaskets?

A Yes.

Q. And from what period of time? Have you reviewed any that fall into the time frame between 1944 and 1968?

A. Yes. Most of the existing qualified products lists that are -- that we have been able to find copies of date

from the 1950s and later. There are very few of them that anybody has been able to find prior to 1950.

Q. Has Worthington, to your knowledge, ever appeared on qualified products list --

MR. KOMITOR: Objection.

THE COURT: Sustained.

[END OF EXCERPT]

* * *

[Colloquy on Proposed Jury Instructions]

[reprinted in Joint CA App. 2222-2228]

THE COURT: Right, that warnings need not be given.

Well, you want to say the knowledge of the product at that time?

MR. KOMITOR: No.

THE COURT: Or that knowledge of the product was such that warning need not be given.

MS. HALBARDIER: Yes.

THE COURT: That no warnings were adequate? That warnings need not be given.

MR. GARRY: Need not have been given.

THE COURT: Thank you. That warnings need not have been given, because there were no warnings, right?

MS. HALBARDIER: Right.

MR. GARRY: Yes.

MR. KOMITOR: That warnings need not have been given.

THE COURT: Yes. Did we talk about government standards?

MR. GARRY: Your Honor, I was going to request -- I don't think adherence to the government standards charge is sufficient. I object to it.

What I would ask be charged is --

THE COURT: Could you tell me where you are reading from?

MR. GARRY: From Boyle versus United Technologies with respect to government contracts. If the United States approved reason -- strike that. "That a supplier could not be liable for a design defect in goods supplied to the military if the United States approved reasonably precise specifications of the products, the material conformed to those specifications, and the supplier warned the United States about the dangers and the use of the materials that were known to the supplier but not to the United States."

MR. KOMITOR: That's only for design defect, not for failure to warn. There is no government contract defense in this case. That only goes to having a defective design, and we took that out of the case. There is no government contract.

THE COURT: It has to do with design, right? Is there some case where it's come in on failure to warn?

MR. GARRY: Failure to warn, your Honor, is nothing more than a branch of design defect.

THE COURT: No, they are separate.

MR. GARRY: They are claiming that the product is defective by reason of failure to warn.

MR. KOMITOR: You are claiming -- you put asbestos in the product. The government didn't insist that you don't put a warning on the product. That's the whole reason why the Second Circuit --

MR. GARRY: I'm just requesting that, your Honor.

MS. HALBARDIER: I join in the request.

THE COURT: Unless you read something to me in a failure to warn case, I don't think it applies to a failure to warn case.

MS. HALBARDIER: My problem with the paragraph is it says, "Compliance with standards." I would ask for another sentence there. "However, you may find that defendant acted reasonably in light of compliance with government standards.

MR. KOMITOR: No. That's the whole point.

THE COURT: But there has to be another way. I'm willing to do balance, but

I'm not sure that's the way. However, you might find -- you may find -- what was it?

MS. HALBARDIER: That defendant acted reasonably.

THE COURT: But that's not the standard. The standard is that it would be the opposite, that compliance for these standards precludes liability. That's the opposite. That's really -- it is not "reasonable," it is a question that the compliance -- if you want a different word I'll use a different word, but not "reasonable." That's injecting something that's not there.

MR. KOMITOR: Does not preclude a finding of liability or --

THE COURT: However, you --

MR. KOMITOR: You can say --

THE COURT: Requires.

MR. KOMITOR: Does not require or preclude.

THE COURT: You want to say does not require a finding and you may find compliance precludes liability?

MR. KOMITOR: I don't see how you balance that.

THE COURT: Since you can't agree I want to move on. However, you may find

compliance precludes a finding of liability. The opposite.

MR. KOMITOR: You can't say that. It does not preclude a finding. The whole point is that just because they comply with government standards, it does not preclude a finding, so you can't say complies with government --

THE COURT: The way it's phrased, if you look at the other one, --

MR. KOMITOR: There are certain things you can't balance.

THE COURT: Compliance is equivalent to a safe product -- I don't know, if you go back to the paragraph before.

MR. KOMITOR: The reason the language is there means that compliance to a standard doesn't necessarily say that you are okay. Compliance with standards is irrelevant is what the point is.

It is not balanced. Compliance with standards is irrelevant. It doesn't matter one way or the other if you comply with standards.

THE COURT: We say it is important and some evidence of reasonableness, right? So really the issue is whether the product is safe, right?

MS. HALBARDIER: Right.

THE COURT: Need not have been given. It's that -- you may take compliance into consideration in deciding whether the product was safe.

MS. HALBARDIER: Okay.

MR. KOMITOR: You mean after the sentence?

THE COURT: Yes.

MR. KOMITOR: Okay.

THE COURT: Is that okay?

MR. KOMITOR: All right, I'll live with it. Actually, I'm going to object. I don't think you can balance it, so let me put my objection on the record.

THE COURT: All right, fine. Objection overruled.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 2896-2900]

Court's Charge

The question for you in this case however is whether even considering the Navy's response or lack of response after defendants' failure to warn -- I'm sorry.

The question for you in this case however is, even after considering whether or not the Navy's response or lack of response -- it doesn't --

Whether or not -- the question here for you is whether the defendants' failure to warn was also a substantial cause of the injury as a reasonable person would view the matter.

If under the circumstances a warning by the defendants would have had no appreciable effect in protecting the persons claimed to have been injured, it could not have been a substantial cause. If, under the circumstances, a warning by the defendants would have had an appreciable effect in protecting the workers it could be found by you to be a substantial cause.

You're here to pass upon the responsibility of the defendants here, not of the Navy. Although you will have to consider the Navy's role in this whole matter in making your determination about the responsibility of the particular defendants before you, as well

as if you get to it the issue of the responsibility of the other defendants -- not -- of the other companies that distributed and manufactured asbestos-containing products that the defendants -- that you find, if you find that the plaintiffs were exposed to them.

As to warnings: You may find warnings should be given not only for those hazards which were definitely established but also for those hazards that were reasonably expected to have existed or you may find that the knowledge of the product was such that warnings need not have been given.

Adherence to government standards while important, and some evidence of reasonableness, does not relieve a party from the obligation to make its product safe. Compliance with those standards by a defendant, even if proven, doesn't preclude a finding of a liability. However, you should take compliance into consideration in deciding whether or not the product was safe.

In view of all that I've just stated, if you find that the products of a defendant were reasonably safe for their intended or unintended, but reasonably foreseeable purpose without warnings, you will find that such products were not defective and the defendants are not liable. And if you find that you will not go any further.

However, on the other hand, if you find that there were, the products were defective, then for failing to warn, you will

then consider whether or not the defective product was a proximate or substantial contributing cause to the plaintiff's injuries.

Remember, I told you before, that something is a proximate cause of an injury if it was a substantial factor in bringing about that injury. Its [*sic*] a substantial factor if it had such an effect in producing the injury, that a reasonable person would consider it to be a cause of an injury; either an act or failure to act can be a proximate cause of an injury -- forget what I just said about a fact.

The failure to warn -- just a second. Forget what I said about that.

The exposure to the product that -- the defective product must be a substantial factor in bringing about the injury, that is, the warning and the product -- forget that. Sorry.

I have been editing and I edited -- this should be edited out. Sorry.

It is not necessary that a defendant's product be the sole or even the dominant cause of injury in order to be considered a proximate cause. There may be more than one proximate cause. Here, in fact, a number of manufacturers were supplying asbestos-containing products to the places that the plaintiffs worked. More than one of them could be liable at the same time. Several factors may operate at the same time, either independently or together, to cause illness,

and in such a case each factor may be a proximate cause.

Each worker had a right to decide for himself whether to work and what he would wear as protection before continuing to work.

[END OF EXCERPT]

* * *

Supreme Court, U.S.
FILED
FEB 09 2000
CLERK

(2)

No. 99-1019

IN THE

Supreme Court of the United States

WORTHINGTON CORPORATION,

Petitioner,

v.

ELAINE RONSINI, EXECUTRIX OF THE ESTATE OF FRANK RONSINI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should deny the petition in light of the fact that (1) the ruling in this action is not in conflict with any decision of this Court or any appellate court, (2) every appellate court has consistently required some government involvement in the contractor's warning or failure to warn as a requisite to applying the government contractor defense, and (3) petitioner could not have prevailed in any court on the basis of this defense?

2. Whether this Court should deny the petition because it seeks, in effect, a review of the factual conclusions of the jury, the trial court and the Appellate Division, which correctly rejected the government contractor claim because there was no proof of any conflict between the State law duty to warn and petitioner's contract with the Navy, which was entirely silent on the issue of warnings?

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COUNTERSTATEMENT OF THE CASE

A. Nature of Case and Procedural History

This is a product liability action arising from the asbestos-related injuries suffered by plaintiff's decedent, Frank Ronsini, as a result of his occupational exposure to the asbestos-containing equipment manufactured and supplied by petitioner Worthington Corporation ["Worthington"]. Mr. Ronsini was a hard-working 44-year-old family man and father of three daughters when he began suffering from the excruciating symptoms of malignant mesothelioma in November 1994.

Early in the trial of this action, with Mr. Ronsini on his deathbed, plaintiffs withdrew their design defect claim to avoid undue delay and excessive conflict with defense counsel, and proceeded solely on the basis of Worthington's failure to warn [Pet.'s App. at 41a]. The jury reached its verdict in favor of the plaintiffs in December 1996, finding that Mr. Ronsini had been exposed to asbestos-containing products manufactured by Worthington, that these products were defective because they lacked a warning, and that Worthington's failure to warn of the health risks associated with the use of its products was a proximate cause of Mr. Ronsini's injuries [Pet.'s App. at 15a-16a]. Addressing Worthington's post-trial motions, the trial court, in its Decision and Order dated May 20, 1997, stressed that:

> Worthington's primary argument is that plaintiff failed to prove that any asbestos supplied by Worthington was inhaled by Mr. Ronsini. . . . The primary issue was left to the trier of fact. The jury unanimously found for the plaintiff and had

> sufficient competent evidence before it that plaintiff Frank Ronsini was occupationally exposed to defendant Worthington's products; that its asbestos-containing products were defective and they were a proximate cause of Mr. Ronsini's injuries.

[Pet.'s App. at 7a]. The court summarily rejected Worthington's numerous other post-trial omnibus issues, including a government contractor claim [Pet.'s App. at 7a].

In its appeal to the Appellate Division, Worthington again relegated the government contractor issue to the back burner, raising it merely as an afterthought toward the end of its sprawling brief. When Worthington finally discussed the issue, it fully accepted the principle, adopted throughout the circuits with only minor variation in its articulation, that the government contractor defense can apply to failure-to-warn claims, but only if the manufacturer proves " 'the applicable federal contract includes warning requirements that significantly conflict with those that might be imposed by state law' " [Worthington's Appellate Division Brief (hereinafter "Worth.'s Brief") at 35].

Because Worthington made absolutely no factual showing of any conflict between the contract and state law duty-to-warn principles, and did not even try to do so, the Appellate Division rejected Worthington's government contractor claim, correctly holding that, "[i]n the absence of any evidence of a conflict between State warning requirements and any Federal prescription of label information or proscription of a warning, there was no basis for Worthington's requested government contractor defense charge" [Pet.'s App. at 3a]. The Appellate Division also

rejected Worthington's principal claims on appeal concerning product exposure [Pet.'s App. at 2a-3a].

Worthington's subsequent motion for reargument and motion seeking leave to appeal to the New York Court of Appeals followed much the same pattern. In each instance Worthington raised a government contractor claim as the last of several issues. On September 16, 1999, the Court of Appeals entered its Decision denying the motion and awarding costs against Worthington [Pet.'s App. at 30a-31a].

B. Statement of Facts

At all stages of the appellate process, Worthington has conceded that (1) Mr. Ronsini's injuries, and ultimately his death, were proximately caused by his heavy exposure to hazardous asbestos while servicing Worthington's equipment in the Navy, (2) Worthington manufactured and supplied the asbestos-containing "pumps, compressors and turbines that were on-board the U.S.S. Weeks and the U.S.S. Gearing" [Worth.'s Brief at 9-10], (3) Worthington "supplied . . . asbestos-containing component parts" [Worth.'s Brief at 17], and (4) Worthington never issued any warnings [Worth.'s Brief at 22]. Worthington's claim throughout was chiefly a technical claim that it should not be found liable because most of the asbestos-containing parts within its equipment had been replaced by identical replacement parts over the years. The Appellate Division easily dispensed with that issue against Worthington [Pet.'s App. at 2a].

With regard to Worthington's blameworthiness, the proofs, in accord with New York's well settled product liability principles,[1] established, and the jury found, that

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1. *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 297, 582 N.Y.S.2d 373, 376 (1992) ("[a] manufacturer has a duty to

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Worthington had actual and constructive knowledge of the extreme hazards of the asbestos placed in or over its equipment, and yet failed to issue any warnings about those hazards. For example, the proofs established that in 1944 Worthington advertised at length in the very issue of the manufacturers' trade periodical "Heating and Ventilating Magazine" in which University of California Professor F.W. Hutchinson published an article entitled "Dust as an Industrial Health Hazard" [TT 3081].[2] Thus, alongside Worthington's boasts about its "large power and industrial equipment lines" [TT 3084], Hutchinson informed the entire industry, including Worthington, about the incurable nature of asbestos diseases, and the ways in which exposure to asbestos was "a hazard to people in the insulating trade" [TT 709]. Moreover, Dr. Barry Castleman, an eminent scientist, testified about the abundant medical and scientific knowledge regarding the hazards of asbestos that had been published and was available to manufacturers such as Worthington as early as the 1920's and 1930's [TT 671-99].

(Cont'd)
warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known"); *Martin v. Hacker*, 83 N.Y.2d 1, 8, 607 N.Y.S.2d 598, 601 (1993) ("[t]he manufacturer's duty is to warn of all potential dangers in its [products] that it knew, or, in the exercise of reasonable care, should have known to exist"); *Cover v. Cohen*, 61 N.Y.2d 261, 275-76, 473 N.Y.S.2d 378, 385 (1984) (manufacturer liable for failing to warn of dangers that come to his attention either directly or through advancements in the state of the art, "with which he is expected to stay abreast").

2. Numbers in brackets following "TT" refer to transcript pages in Volumes II-V and the "Exhibit Volume" of the "Joint Appendix of Appellants" submitted to the Appellate Division, First Department; numbers in parentheses following "JA" refer to pages in the "Joint Appendix of Plaintiffs-Respondents" submitted to the Appellate Division, First Department.

Significantly, Worthington, as the "world's largest builder of pumping machinery" in the 1940's [TT 1215], made all of its machinery the same way, regardless of whether it was sold to the Government. Indeed, Francis Arsi, Worthington's Manager of Government Sales and its designated corporate witness, conceded that it was Worthington's policy, regardless of Navy specifications, to design and load its equipment with asbestos-containing parts. He stated that Worthington "common[ly]" marketed "asbestos-containing gaskets and packing" to customers other than the Government [TT 1863].[3]

Nonetheless, evidently to protect its powerful market position, Worthington *never* issued any type of warning to users such as Mr. Ronsini, or to any other users, whether in the private or government sector [TT 1210, 1855-56]. Nor, in violation of its duty under New York law,[4] did Worthington at any time test or inspect the job site regarding the presence or hazards of asbestos [TT 1212, 1217], despite

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3. *See Megill v. Worthington Pump, Inc.*, 1999 U.S. Dist. LEXIS 4433, LEXIS op. at 9 n.1 (D. Del. Mar. 26, 1999) ("[t]he record contains no evidence that the pumps sold by Worthington to the U.S. Navy were different from those pumps sold commercially"); *cf. In re Hawaii Fed. Asbestos Cases — Kaiu v. Raymark Indus., Inc.*, 960 F.2d 806, 812 (9th Cir. 1992) ("the military constituted a relatively insignificant purchaser of [asbestos-containing insulation] products that were primarily designed for applications by private industry").

4. *See Cover v. Cohen*, 61 N.Y.2d 261, 275-76, 473 N.Y.S.2d 378, 385 (1984) (manufacturer has duty to "stay abreast" of any health and safety research relevant to its product); *George v. Celotex Corp.*, 914 F.2d 26 (2d Cir. 1990) (under New York law, a manufacturer "has a duty 'to keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby' ").

the fact that, as Mr. Arsi admitted, neither "the government [n]or any entity" prohibited Worthington from conducting such an inspection [TT 1216-17]. There was similarly no evidence whatsoever that the Navy controlled or would have prevented plaintiff from wearing some protective respiratory device had he been warned of the hazards of exposure to asbestos-containing dusts.

Further, Worthington instructed purchasers of its pumps and compressors to replace the asbestos-containing components with like parts. Another corporate defense witness, Dennis Norton, Vice-President of Worthington's Government Business Unit, conceded that Worthington supplied spare parts, and that these matched the original asbestos-containing equipment, although "[t]here was no spec for it, no mil spec for the material. [There was no] military specification" [Pet.'s App. at 60a; TT 1943]. This is a significant admission with respect to the issue of whether Worthington even has a colorable claim to government contractor immunity, especially in light of the Appellate Division's finding that Worthington supplied "enough replacement parts for there to be Worthington components still in use at the time of Mr. Ronsini's exposure, and it was reasonable to infer that such parts had in fact been supplied and used" [Pet.'s App. at 2a].

In all events, Worthington created and provided the original instruction and service manuals for the compressors that Mr. Ronsini serviced on board the U.S.S. Weeks and the U.S.S. Gearing [Pet.'s App. at 61a-62a; JA 417; TT 1944-45, 1950]. Notably, those manuals contained no warnings and apparently involved no direct input from, or back and forth with, the Government [JA 417-82].

Instead, it was not until 1972, when Mr. Ronsini left the Navy, that the Government produced an "updated" manual that paralleled and essentially adopted Worthington's original manual [JA 235]. Indeed, Mr. Norton conceded that Worthington "ma[d]e up a lot of material" in this updated manual [TT 1949]. Critically, this later "Navy" manual provides no specification, guideline, or contract requirement with respect to the issuance of warnings. In short, no government specification, guideline, pronouncement, practice or contract term in any way impaired or conflicted with Worthington's state law duty to warn.[5]

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5. Finally, Worthington's petition is characterized by numerous significant misstatements of fact and law, which respondent is here compelled to address, pursuant to Supreme Court Rule 15(2). For instance, in upholding the jury's verdict against Worthington the trial court implicitly and explicitly found that Worthington knew or should have known of the hazards of its products, but tortiously failed to warn. Yet in the instant petition — as it unsuccessfully attempted to do in the State appellate courts — Worthington tries to recast an unrelated trial court ruling (concerning New York's discrete judgment molding principles) as a blanket finding that it "had no knowledge of a risk about which it could have warned workers" [Pet. at 5]. Quite the contrary, as shown in the text above, the trial court made clear its view that, as the Appellate Division recognized, the proofs compellingly supported the verdict.

Nor does the record in any way substantiate Worthington's related claim in its petition that, "[i]ndeed, the Navy had far greater and more sophisticated knowledge of the potential hazards and dangers of asbestos-containing products than did Worthington" [Pet. at 5]. This claim is false, and nothing in the appendix pages to which Worthington cites supports the assertion. The simple fact is that there is no evidence that the Navy had "far greater and more sophisticated knowledge" than Worthington did; nor is there any evidence that Worthington ever attempted to find out what the Navy knew about the dangers of asbestos use, or that it attempted in any way to warn the Navy about those dangers.

REASONS FOR DENYING WRIT

THE RULING IN THIS ACTION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY APPELLATE COURT, NOR IS THERE ANY CONFLICT AMONG THE APPELLATE COURTS, ALL OF WHICH REQUIRE GOVERNMENT INVOLVEMENT IN THE DECISION WHETHER TO WARN

A review of the decisions of each appellate court that has considered the issue makes clear that there is no conflict regarding the circumstances under which the government contractor defense may apply to a failure-to-warn claim. The state of the law in each circuit is that "[i]n the government contractor defense context, design defect and failure to warn claims differ practically as well as theoretically." *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1156 (6th Cir. 1995). As the Seventh Circuit has noted, there is little difference between the circuit rulings on this issue. *Oliver v. Oshkosh Truck Corp.*, 96 F.2d 992, 1004 n.8 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116, 117 S. Ct. 1246 (1997).

Initially, Worthington concedes that it could not prevail in the Second, Ninth or Eleventh Circuits, because these "apply the same" interpretation of the applicability of the government contractor defense to a failure-to-warn claim as did the Appellate Division [Pet. at 15]. Worthington also acknowledges that the Sixth and Seventh Circuits view the defense to require completely different factual predicates, depending on whether the defense is applied to a design defect or a failure-to-warn cause of action. Thus, Worthington's only claim of any conceivable conflict arises from its misinterpretation of rulings in the Fourth and Fifth Circuits. However, as will be shown below, even a cursory

reading of decisions in those circuits establishes that they, too, have uniformly construed the defense to require proof of some government involvement in the contractor's decision whether to warn.

It is clear that, in the present case, the Appellate Division's rejection of petitioner's attempt to invoke the government contractor defense follows this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988), and presents no conflict with any other appellate court's pronouncements. Because there is no conflict, petitioner has felt compelled to scrutinize the cases in a search for any nuances or imagined nuances, has taken these imagined nuances out of context, and now tries to argue that this Court should find that "the nation's appellate courts are divided" [Pet. at 15]. They are not, and, in fact, there are no conflicts.

The Appellate Division correctly ruled that, "[i]n the absence of any evidence of a conflict between State warning requirements and any Federal prescription of label information or proscription of a warning, there was no basis for Worthington's requested government contractor defense charge" [Pet.'s App. at 3a]. The Appellate Division's ruling is in total harmony with the universally-held view that, while the government contractor defense may sometimes apply to failure-to-warn claims, it does so only under the limited circumstances in which the party seeking to assert the defense can prove that the Government was in some way involved in the contractor's decision about warnings. That ruling is also in accord with the state of the law in each circuit that has examined the issue, and not one circuit would apply the government contractor defense under the circumstances of the present case.

Courts have applied *Boyle* consistently. In each case, the question is always whether the Government expressly "considered" and was involved with the particular feature of the product — *i.e.* the particular design feature or the warning or lack of warning — alleged to be injurious. 487 U.S. at 512, 108 S. Ct. at 2518. Moreover, in the warnings context, the courts consistently state the issue to be whether the contractor could have complied "with both its contractual obligations and the state-prescribed duty of care" with regard to warnings, and whether a "conflict exists between the state tort duty and the federal contractual duty." *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489 (11th Cir. 1990); *In re Joint Eastern and Southern Dist. New York Asbestos Litig. — Grispo v. Eagle-Picher Indus., Inc.*, 897 F.2d 626, 630 (2d Cir. 1990) [hereinafter *New York Asbestos Litig.*] (stressing that the issue is whether any Navy specification "conflict[ed] with a state law duty to warn," and that a "federal contract specification requiring a certain product design" does not automatically "conflict[ ] with state law requiring a certain set of warnings incident to use of that product or design").

With respect to rulings in the state courts, Worthington concedes [Pet. at 19-20], as it must, that these, too, have universally adopted the principles just stated, and that none of these courts agrees with Worthington's position that, for purposes of government contractor immunity, the failure-to-warn claim simply dissolves into the design defect cause of action. *E.g.*, *Miller v. United Technologies Corp.*, 660 A.D.2d 810, 836 (Conn. 1995); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 884 P.2d 920, 930-31 (Wash. 1994); *see also Feldman v. Kohler Co.*, 918 S.W.2d 615, 627 (Tex. Ct. App. 1996); *Jackson v. Deft, Inc.*, 273 Cal. Rptr. 214, 221 (Ct. App. 1990); *In re New York City Asbestos*

Litigation — Weitzman v. Eagle-Picher Industries, Inc., 144 Misc. 2d 42, 542 N.Y.S.2d 118, 120 (Sup. Ct., N.Y. Cty. 1989) (stressing that asbestos defendants under contract with the Government "could have complied with both the military specifications and also placed adequate warnings on [their] packages, without in any way frustrating any identifiable federal interest").

As the Appellate Division correctly noted, and as implicitly conceded by petitioner, Worthington has not been able to proffer even a scintilla of evidence that the Navy ever considered or exercised any discretion about the issuance of warnings with regard to Worthington's pumps, turbines and/or compressors. Certainly, Worthington produced no evidence whatsoever that the Navy would have objected to a warning that workers should take some protective measure when exposed to ultrahazardous asbestos dust and fibers. Nor was there any evidence that the Navy ever took any position at all on the question of whether to warn the workers. Worthington's failure to warn was entirely its own decision, and was fully consistent with Worthington's failure to warn any of its many customers or product users worldwide about the asbestos health hazards. The Navy was simply silent on this issue, uninvolved in any way.

Worthington has failed to demonstrate that any appellate court has upheld application of the government contractor defense under circumstances similar to those present here, or in the context of any failure-to-warn asbestos-related action for that matter.[6] Instead, anxious to prevent the finality

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6. Indeed, those courts dealing with the government contractor defense in asbestos actions have consistently rejected the defense as applied to the failure to warn cause of action. *See, e.g., New York*

(Cont'd)

of this action, having exhausted all state appellate remedies, Worthington seeks to create a conflict in the circuits where there is none. Well aware that there is no proof that the Navy ever took any position regarding the issuance of warnings on the part of Worthington or any other provider to the Government of asbestos-containing products, Worthington desperately misconstrues the law in two circuits, the Fourth and the Fifth. In so doing, Worthington wrongly suggests that no government involvement is required at all for a manufacturer to obtain government contractor immunity from liability for failing to warn users and consumers of the hazardous asbestos components contained in their products [Pet. at 15-16].

However, Worthington's interpretation of the state of the law in the Fourth and Fifth Circuits is entirely incorrect. Worthington wrongly holds out the cases of *Emory v. McDonnell Douglas Corp.*, 148 F.3d 347 (4th Cir. 1998), in the Fourth Circuit, and *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989), in the Fifth Circuit, as standing for the proposition that, in those courts, the government contractor defense somehow automatically precludes a failure to warn claim when it precludes a design defect claim.

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Asbestos Litig., 897 F.2d 626, 630 (2d Cir. 1990); *Dorse v. Eagle-Picher Indus., Inc.*, 898 F.2d 1487, 1489 (11th Cir. 1990); *In re Hawaii Fed. Asbestos Cases — Kaiu v. Raymark Indus., Inc.*, 960 F.2d 806, 812 (9th Cir. 1992); *In re New York City Asbestos Litigation — Weitzman v. Eagle-Picher Industries, Inc.*, 144 Misc. 2d 42, 542 N.Y.S.2d 118, 120 (Sup. Ct., N.Y. Cty. 1989); *see also Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 127 (3d Cir. 1998); *Megill v. Worthington Pump, Inc.*, 1999 U.S. Dist. LEXIS 4433, LEXIS op. at 9 n.1 (D. Del. Mar. 26, 1999); *Hammond v. North American Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210 (Ill. Sup. Ct. 1983).

In *Emory*, however, the Court of Appeals established that, in the Fourth Circuit, the failure-to-warn claim is considered separately from the design defect claim, and is evaluated on the basis of discrete factors. While the *Emory* Court ultimately affirmed the dismissal of the plaintiff's failure-to-warn claim, this ruling had nothing at all to do with the government contractor defense. Instead, the Court decided the appeal solely on the basis of Maryland products liability law. Significantly, the Court noted that, although the government contractor had presented a factual predicate sufficient to preclude the application of Maryland law with respect to Emory's design defect claim, that State's law regarding failure to warn *should be applied*, because it in fact "poses no conflict." 148 F.3d at 352-53.

Thus, *Emory* demonstrates that, in the Fourth Circuit, as in each circuit addressing the issue, the failure-to-warn claim must be separately scrutinized for a "significant conflict" as between state law requirements and Federal interests. Consistently, under *Boyle*, Federal interests are implicated only when the "feature in question" — in a failure-to-warn context the warning or lack of warnings — "was considered by a Government officer, and not merely by the contractor itself." *Boyle*, 487 U.S. 500, 512, 108 S. Ct. 2510, 2518.

With respect to the Fifth Circuit, the appropriate case to examine is *In re Air Disaster At Ramstein Air Base, Germany — Perez v. Lockheed Corp.*, 81 F.3d 570 (5th Cir. 1996) [hereinafter *Ramstein*], a case Worthington merely alludes to in a cryptic footnote [Pet. at 16 n.4]. In *Ramstein* the Fifth Circuit held that the defendants had satisfied each of the three *Boyle* elements with regard to the design defect cause of action, and then discretely addressed plaintiffs' failure-to-warn claim. The Court enunciated the Fifth Circuit's view,

which is fully in accord with *Boyle*, with the Appellate Division's ruling in the present case, and with the other circuits that have addressed the issue. Specifically, the Court held that

> [a] separate failure to warn claim may survive the government contractor immunity defense if the defendant cannot establish "an identifiable federal interest or policy in the existence or methods of warning and a significant conflict between the federal interest or policy and the operation of state law." *Garner v. Santoro*, 865 F.2d 629, 635-36 (5th Cir. 1989). A conflict between federal policy and state law might arise if there is evidence that the Government was involved in the decision to give, or not to give, a warning.

81 F.3d 570, 576.

Notwithstanding its dismissal of plaintiffs' design defect claims on the basis of the government contractor defense, the Fifth Circuit panel in *Ramstein* found that the evidence adduced by defendants did not permit it "to determine whether the Government exercised sufficient discretion with respect to a warning to bring the warning claim within the scope of *Boyle*." *Id.* Accordingly, the Court concluded that the only issue was whether the defendants had a duty to warn "under the relevant state law . . . ." *Id.*[7]

Relegating the leading and most current Fifth Circuit opinion in *Ramstein* to a footnote, Worthington relies

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7. The *Ramstein* Court, applying the law of Georgia, found that, under that State's product liability precepts, there was no duty to warn.

exclusively on an earlier and irrelevant case, *Smith v. Xerox Corp.*, to illustrate the state of the law in the Fifth Circuit. Worthington's approach is disingenuous, both because *Smith* never expressly addresses the issue of the applicability of the government contractor defense to failure-to-warn claims, and because *Ramstein* does.

The ruling in *Smith* in no way establishes, as Worthington suggests, some anomalous Fifth Circuit principle by which a plaintiff's failure-to-warn claim is subsumed within his design defect claim for purposes of the government contractor defense. Apart from originally including a failure-to-warn claim in his complaint, Smith does not appear to have independently raised this issue in his appeal; nor did Xerox address Smith's failure-to-warn claim in its pre-*Boyle* summary judgment motion. Accordingly, the appeal in *Smith* was confined to the design defect cause of action only, and did not deal with the failure-to-warn issue at all. In sum, *Smith* is simply not informative about the way in which the Fifth Circuit applies the government contractor defense to failure-to-warn claims.[8]

Thus, notwithstanding Worthington's misreading, the state of the law in the Fourth and Fifth Circuits is that, when government contractor immunity is asserted, the failure-to-warn claim must be considered separately from the design

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8. On the other hand, it is noteworthy that the *Smith* Court of Appeals indicated that the Fifth Circuit is fully in accord with the Ninth Circuit's view of the government contractor defense. 866 F.2d 135, 137 (citing *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983)). In the instant petition, Worthington admits that the Ninth Circuit requires government involvement in the decision whether to warn, and also concedes that it could not prevail in that Court. But Worthington overlooks the fact that the Fifth Circuit had aligned itself with the Ninth.

defect claim, and stands or falls on its own. *See Emory*, 148 F.3d 347, 350. In these appellate courts, unless "the Government exercised sufficient discretion with respect to a warning to bring the warning claim within the scope of *Boyle*," and unless the defendant has demonstrated, at the very least, that "the Government was involved in the decision to give, or not to give, a warning," the government contractor defense will not be deemed to apply to plaintiff's failure-to-warn claims. *Ramstein*, 81 F.3d 570, 576. Indeed, this approach is entirely reasonable, and in accord with the other rulings applying *Boyle* in the failure-to-warn context.

Accordingly, there is no conflict between the Appellate Division ruling in the present case, and the state of the law in the Fourth and Fifth Circuits. Nor do rulings in the Fourth and Fifth Circuit, or the Appellate Division ruling for that matter, in any way conflict with this Court's pronouncement in *Boyle*, or with the decisions in other circuits. Thus, Worthington — which adduced absolutely no evidence of any Government interest or involvement in the issue of warnings — would not prevail in any circuit, including the Fourth or Fifth Circuits, which Worthington claims are the most favorable to its position.

Indeed, all of the appellate court rulings cited by Worthington are in accord. As the Seventh Circuit stressed in *Oliver*, it is "well established . . . that a defendant may not defeat a state failure-to-warn claim simply by establishing the elements of the government contractor defense with respect to a plaintiff's design defect claim." 96 F.3d at 1003.[9]

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9. In *Oliver* this Court denied certiorari with respect to the very issue Worthington now raises. 520 U.S. 1116, 117 S. Ct. 1246 (1997).

The case of *Tate v. Boeing Helicopters*, 55 F.3d 1150 (6th Cir. 1995), is also illustrative. In *Tate* the Sixth Circuit affirmed the dismissal of plaintiffs' design defect claim, but held that a separate analysis must be performed with respect to plaintiffs' failure-to-warn claims. As to design defect, the Court noted the consensus among the circuits that, under the first *Boyle* prong, defendant must show that the government and the contractor "engage[d] in a 'continuous back and forth' review process regarding the design in question." *Id.* at 1154 (quoting *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir.), *cert. denied*, 474 U.S. 821, 106 S. Ct. 72 (1985)). The Court also recognized that the general rationale for this requirement is that, " '[w]hen the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion.' " *Tate*, 55 F.3d 1150, 1154 (quoting *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.), *cert. denied*, 493 U.S. 935, 110 S. Ct. 327 (1989)).[10]

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10. In the present case, of course, there is no evidence of "a continuous back and forth" between the Navy and Worthington regarding the design or nature of Worthington's pumps, turbines and/or compressors. Thus, Worthington would have failed to satisfy the burden imposed upon it, in the New York court and in every circuit, to establish government contractor immunity *even with respect to a design defect claim* (which, in any event, was withdrawn in this case).

There is also a serious question about whether there is even a predicate for alleging government contractor immunity in this case, since Worthington's own corporate designee admitted that there was no military specification for the very replacement parts to which Mr. Ronsini was exposed [Pet.'s App. at 60a; TT 1943].

The Court of Appeals in *Tate* next addressed the District Court's automatic dismissal of plaintiffs' failure-to-warn claim. The Sixth Circuit panel reversed the lower court's holding because it determined that a separate analysis, and a separate factual predicate, are required before government contractor immunity can be deemed to apply to the failure-to-warn claim. 55 F.3d at 1156-57. The Court noted that, "[s]imply because the government exercises discretion in approving a design does not mean that the government considered the appropriate warnings, if any, that should accompany the product." *Id.* at 1156.[11] Accordingly, the *Tate* Court remanded the case for a separate determination on the failure-to-warn issue. *Id.* at 1157.

In sum, the state of the law in the Sixth and Seventh Circuits is consistent with that in the Fourth and Fifth Circuits. In none of these courts would Worthington be afforded government contractor immunity with respect to plaintiff's failure-to-warn claim. Nor does the doctrine as enunciated by these courts in any way conflict with the Appellate Division's ruling in the present case, or with any other appellate rulings.[12]

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11. The *Tate* Court also wisely warned against conflating the third *Boyle* element with state failure-to-warn requirements, as Worthington attempts in its petition. While the *Boyle* element "simply encourages contractors to provide the government with all the information required to soundly exercise its discretion," state failure-to-warn requirements " 'accomplish an entirely different objective of helping those who use or otherwise come into contact with a product to protect their own safety.' " 55 F.3d 1150, 1156 (quoting *New York Asbestos Litig.*, 897 F.2d 626, 632 (2d Cir. 1990)).

12. As a point of information, it should be noted that Worthington's claim of conflict rests principally on dicta in the repetitive stress injury case of *Russek v. Unisys Corp.*, 921 F. Supp. (Cont'd)

(Cont'd)
1277 (D.N.J. 1996). It should also be noted that Worthington does not claim that it could have prevailed, nor would it prevail, under the ruling in *Russek*. The District Court there accurately stressed that, under *Boyle*, there must be "a 'continuous back and forth' [between the Government and the contractor] as to the product feature containing the alleged design defect . . . ," 921 F. Supp. 1277, 1294, an element present in *Russek* yet wholly absent in the present case. *Accord Tate*, 55 F.3d 1150, 1154; *Harduvel*, 878 F.2d 1311, 1320; *Koutsoubos*, 755 F.2d 352, 355. In all events, the *Russek* decision is based solely on the facts and circumstances unique to it, and on product liability principles peculiar to New Jersey, which views a failure-to-warn claim as a species of design defect claim. *Russek*, 921 F. Supp. 1277, 1294; *see also Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710 (D. Md. 1997) (repetitive stress injury decision adopting Sixth Circuit pronouncement in *Tate)*.

Further, *Russek* is not the only district court case, and certainly not the definitive word, within the Third Circuit addressing the government contractor issue with respect to a failure-to-warn claim. *See Megill v. Worthington Pump, Inc.*, 1999 U.S. Dist. LEXIS 4433, LEXIS op. at 12 (D. Del. Mar. 26, 1999) (under factual circumstances virtually identical to those in the present case, court rejected Worthington's government contractor defense in the context of removal, and ordered the case remanded to the State court because Worthington had failed to establish that the Navy had participated in, or caused, Worthington's failure to warn); *see also Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 127 (3d Cir. 1998) (asbestos case in which removal deemed inappropriate because defendant contractor "failed to establish the necessary causal connection between [its] failure to warn [and defendant's] military contract obligations").

CONCLUSION

A review of the decisions nationwide demonstrates that there is no conflict, let alone a meaningful one, between the circuits in applying the government contractor defense to failure-to-warn claims. Nor does the doctrine enunciated by the various appellate courts conflict with the Appellate Division's ruling in the present case, or with this Court's pronouncement in *Boyle*. Accordingly, for all of the reasons set forth above, the respondent respectfully requests that the Court reject petitioner's request for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 11 2000
CLERK

No. 99-1019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

WORTHINGTON CORPORATION,
Petitioner,

v.

ELAINE RONSINI,
EXECUTRIX OF THE ESTATE OF FRANK RONSINI,
Respondent.

On Petition for Writ of Certiorari to the New York Supreme Court, Appellate Division, First Department

BRIEF FOR BELL HELICOPTER TEXTRON INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 11, 2000

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---

BRIEF FOR BELL HELICOPTER TEXTRON, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Bell Helicopter Textron, Inc. ("Bell") is a manufacturer of helicopters used in military and civil aviation. Bell's military helicopters have been used by the Nation's Armed Forces for

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[1]Written consents to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that the brief was not authored in whole or part by counsel for a party and further states that no entity other than *amicus* and its insurer (the United States Aircraft Insurance Group, managed by United States Aviation Underwriters, Inc.) made a monetary contribution to the preparation and submission of this brief.

over half a century. Bell's OH-13 medical evacuation helicopters rescued over 25,000 soldiers during the Korean War. Bell-manufactured helicopters, including the UH-1 "Huey" and the AH-1 "Cobra," were employed extensively during the Vietnam War. Bell continues to manufacture advanced helicopters for the U.S. military, such as the TH-67 training helicopter, the AH-1W "Super Cobra," and the OH-58D "Kiowa Warrior." Moreover, the Bell Boeing V-22 "Osprey" tilt-rotor aircraft is now being manufactured and delivered to the military.

This case is of concern to Bell because it faces liability claims when the helicopters that it manufactured for the military are involved in accidents. Such claims arise not just out of accidents involving aircraft in military service, but also out of accidents involving aircraft that have been sold by the Government as surplus into the civil aviation market. While the resulting suits typically raise claims for alleged defects in the helicopter's design, they often also include claims that Bell allegedly failed to provide adequate warnings about the potential hazards in flying its military aircraft as designed.

Even though the military maintains strict control of the contents of aircraft flight and maintenance manuals, including post-manufacture bulletins to operators, Bell has had mixed success in defending failure-to-warn claims on the basis of the government contractor defense established in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988). This is because some lower courts, like the New York courts in this case, have adopted versions of the government contractor defense for failure-to-warn claims that are difficult, if not impossible, to satisfy. The result is that plaintiffs are able to evade the *Boyle* defense by pleading their claims as ones for failure to warn rather than for design defect.

As demonstrated in the petition for certiorari, there is a conflict among the decisions of the circuits and other lower courts on how the *Boyle* defense should be applied to failure-to-warn claims. The uncertainty regarding the applicable standard increases Bell's costs in evaluating and defending against such claims. It would therefore be of great benefit to Bell if there were a uniform standard governing the applicability of the government contractor defense to failure-to-warn claims — particularly if that standard provided protection for failure-to-warn claims that is equivalent to that provided by *Boyle* for design defect claims.

For these reasons, Bell files this *amicus* brief urging the Court to grant the petition for certiorari.

ARGUMENT

Introduction and Summary

The petition for Worthington Corporation raises an important question of federal law with which this Court has not squarely dealt: How should the government contractor defense established in *Boyle* v. *United Technologies Corp.*, 487 U.S. 500 (1988), be applied to claims for failure to warn against government contractors? *Boyle* itself dealt with claims that the escape hatch on a helicopter manufactured by Sikorsky for the Marines was defectively designed.[2] *Id.* at 503.

While not directly dealt with in *Boyle*, the question of how the government contractor defense should be applied to failure-

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[2]*Boyle* ruled that design defect claims against a government contractor are precluded "when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." 487 U.S. at 512.

to-warn claims is of critical importance to contractors who manufacture aircraft and other equipment for the Government.[3] This is because, in many cases, claims for alleged design defects can plausibly be reformulated as claims for failure to warn. That is, plaintiffs can claim that they were not adequately warned of the dangers posed by the allegedly defective design.[4] Unless the government contractor defense established by *Boyle* provides meaningful protection against such failure-to-warn claims, the shield against tort liability furnished by *Boyle* to government contractors can be circumvented simply by pleading the claim as one for failure to warn.

The petition for certiorari convincingly demonstrates that there is disarray among the circuits on how the *Boyle* defense is to be applied to failure-to-warn claims. Bell in this brief as an *amicus* in support of the petition demonstrates that there are two additional factors supporting certiorari. First, the correctness of the construction of *Boyle* employed by the New York courts in this case is a matter of general importance, for that construction will adversely affect government suppliers, including aircraft manufacturers, in cases where exposure to asbestos is not even remotely an issue. Second, the rationale relied upon by the Appellate Division is in conflict with *Boyle*, for it resurrects, in a failure-to-warn context, a version of the government

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[3]There are, of course, three basic kinds of product liability claims: (1) design defect claims, (2) manufacturing defect claims, and (3) failure-to-warn claims. See generally *Restatement (Third) of Torts: Product Liability* § 2 (1998). For a discussion on the applicability of *Boyle* to manufacturing defect claims, see *Bailey* v. *McDonnell Douglas Corp.*, 989 F.2d 794, 800-02 (5th Cir. 1993).

[4]See, *e.g.*, *Butler* v. *Ingalls Shipbuilding, Inc.*, 89 F.3d 582, 586 (9th Cir. 1996)(holding that government contractor defense bars design defect claim, but remanding for determination on whether "specifications of Ingalls' contract with the Navy conflicted with Ingalls' duty to warn under state law.").

contractor defense that was explicitly rejected in *Boyle* for design defect claims.

A. The Certiorari Petition Raises an Issue of General Importance Beyond the Context of Asbestos Litigation.

The petition arises in the context of the asbestos litigation. The burdens imposed on courts and litigants by the "elephantine mass of asbestos cases" are familiar to this Court. *Ortiz* v. *Fibreboard Corp.*, 119 S. Ct. 2295, 2302-03 (1999); see *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591, 597-98 (1997). While this case may arise in the context of the asbestos litigation, the issue raised is one of general importance to government contractors.

The evidence at trial in this case demonstrated that the Navy during World War II specified that asbestos-containing gaskets be used on the pumps supplied by Petitioner. Pet. App. 50a-54a, 58a.[5] The Navy, moreover, controlled the content of those service manuals where warnings regarding the dangers of inhaling asbestos might have logically been placed. Pet. App. 55a-59a, 61a-62a. Nonetheless, the Appellate Division affirmed on the ground that there was an "absence of any evidence of a conflict between State warning requirements and any Federal prescription of label information or proscription of a warning . . ." Pet. App. 3a.

Under this government "prescription or proscription" interpretation of the government contractor defense, the defense applies to failure-to-warn claims only if (a) the Government itself expressly prescribed the warnings to be given or (b) the Government forbade the manufacturer from providing any

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[5]Citations to "Pet. App." are to the Appendix accompanying the Petition.

additional warnings to its personnel. That is an extraordinarily difficult standard to satisfy, particularly when the events in question occurred decades ago.

This standard for applying the government contractor defense to failure-to-warn claims, moreover, makes it easy for plaintiffs to avoid *Boyle* even though the Government approved the product's design. All plaintiffs need do is plead their case as one for failure to warn in the hope that there is no evidence that the United States, although aware of the dangers, either prescribed a specific warning or proscribed the furnishing of other warnings.

Suppliers of aircraft to the Government, including Bell, have also lost court decisions that constrict the application of the government contractor defense to failure-to-warn claims. In *Snell* v. *Bell Helicopter Textron, Inc.*, 107 F.3d 744 (9th Cir. 1997), for instance, the Ninth Circuit remanded a failure-to-warn claim in a military accident case on the ground, *inter alia*, that Bell had not shown that government specifications "constrain[ed] Bell's ability to comply with whatever duty to warn it may have had." *Id.* at 749. Accord *Timberline Air Service, Inc.* v. *Bell Helicopter Textron, Inc.*, 125 Wash. 2d 305, 326, 884 P.2d 920, 931 (1994)(government contractor defense applies to failure-to-warn claim "only if there are precise government specifications pertaining to warnings").

Unless there is some written documentation demonstrating express government prescription or proscription regarding warnings, it can be extraordinarily difficult to demonstrate, often years after the fact, that the Government dictated the precise contents of any warning to be given or explicitly precluded the furnishing of other warnings. Memories fade, and witnesses disappear or die.

In any event, as Petitioner has demonstrated in this case with respect to its pumps, the reality is that the military carefully

reviews and ultimately controls the content, including revisions thereto, of the operating and maintenance manuals for aircraft used by its personnel.[6] Only warnings approved by the military are circulated to its personnel. In Bell's experience, the military, for reasons of its own, has even declined to pass on to military personnel alert bulletins that Bell has sent to operators of civilian aircraft that are similar in design to military models. Thus, even in the absence of a distinct record showing a government decision on whether and how to warn about a specific hazard, there must have been a decision, implicit or explicit, by the government personnel on whether and how to warn military personnel about any hazards as to which government personnel were knowledgeable.

In recognition of this reality, other lower courts have (correctly Bell believes) rejected the contention that aircraft manufacturers may invoke the government contractor defense on failure-to-warn claims only if they "propose[d] actual warnings concerning every potential problem with a specific design feature" and show that "such proposed warnings" were

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[6]See, *e.g.*, *Tate* v. *Boeing Helicopters*, 140 F.3d 654, 658 (6th Cir. 1998)("*Tate II*")("[T]he Army's review of the CH-47D Operator's Manual was extensive."); *In re Aircraft Crash Litigation Frederick, Md.*, 752 F. Supp. 1326, 1366 (S.D. Ohio 1990) ("It is clear to this Court that the Air Force tightly controlled the content of the flight manuals . . . ."), *aff'd mem. sub nom. Darling* v. *Boeing Co.*, 935 F.2d 269 (6th Cir. 1991)(table); *Nicholson* v. *United Technologies Corp.*, 697 F. Supp. 598, 604 (D. Conn. 1988)("The government maintained control over the contents of the manual and made revisions to the contents without the consultation or knowledge of UTC."); *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 784, 660 A.2d 810, 836 (1995)("The government specified the contents of the manuals and, therefore, controlled the content of any warnings.").

rejected by the military.[7] Those cases have applied the three-pronged *Boyle* test either directly, or with slight modification, to failure-to-warn claims. See Petition 16-17 (citing *Emory* v. *McDonnell Douglas Corp.*, 148 F.3d 347, 352 (4th Cir. 1998) (following *Boyle*); *Smith* v. *Xerox Corp.*, 866 F.2d 135, 137 (5th Cir. 1989)(following *Boyle*); *Tate* v. *Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995)("*Tate I*")(adopting modified *Boyle* test)[8]; *Oliver* v. *Oshkosh Truck Corp.*, 96 F.3d 992, 1003-04 (7th Cir. 1996)(following *Tate I*), *cert. denied*, 520 U.S. 1116 (1997)).

Aircraft manufacturers need to know what is the standard for determining when the government contractor defense precludes failure-to-warn claims. Is the standard that applied by the courts below: namely, whether the Government expressly prescribed the warnings to be used or proscribed the furnishing of any additional warnings? Or is it sufficient, as other courts have held, that the Government be "both knowledgeable and concerned about the contents of the proposed warnings before granting its approval"? *Tate II*, 140 F.3d at 658. Knowing the answer to these questions is critical to government contractors, not only in evaluating potential liability in individual cases, but

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[7] *Tate* v. *Boeing Helicopters*, 921 F. Supp. 1562, 1566 (W.D. Ky. 1996), *aff'd*, 140 F.3d 654 (6th Cir. 1998).

[8] The Sixth Circuit held in *Tate I*:

> "When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the Untied States of the dangers in the equipment's use about which the contractor knew, but the United States did not." 55 F.3d at 1157.

also in evaluating future liability for the purpose of estimating likely costs when bidding for new contracts. And, as the Court recognized in *Boyle*, the answer to this question is also important to the Government, for, in the long run, contractors will pass their costs on to the Government.[9]

In sum, the importance of the issue raised in this case goes far beyond specific context of the asbestos litigation and has general applicability to failure-to-warn claims against government contractors, including those manufacturers supplying advanced aircraft to the Nation's military.

B. The Decision Below Employed a Test for Invoking the Government Contractor Defense That Was Explicitly Rejected by the Court in *Boyle*.

One ground for granting certiorari is that a lower court has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). While *Boyle* did not directly involve failure-to-warn claims, the decision below has adopted a version of the government contractor defense for failure-to-warn claims that the Court expressly rejected in *Boyle* for design defect claims.

1. In *Boyle*, the Court considered, and rejected, a formulation of the government contractor defense that had been adopted by the Eleventh Circuit in *Shaw* v. *Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988). Under that formulation, the defense

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[9]The Court reasoned as follows in *Boyle*: "The imposition of liability on Government contractors will directly affect the terms of Government contracts; either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." 487 U.S. at 507.

> "would preclude suit only if (1) the contractor did not participate, or participated only minimally, in the design of the defective equipment; *or* (2) the contractor timely warned the Government of the risks of the design and notified it of alternative designs reasonably known by it, *and* the Government, although forewarned, clearly authorized the contractor to proceed with the dangerous design." *Boyle*, 487 U.S. at 513 (italics in original).

While recognizing that this "formulation may represent a perfectly reasonably tort rule," this Court ruled that it was not "designed to protect the federal interest embodied in the 'discretionary function' exemption" to the Federal Torts Claims Act.[10] *Id.* The Court reasoned:

> "The design ultimately selected may well reflect a significant policy judgment by Government officials whether or not the contractor rather than those officials developed the design. In addition, it does not seem to us sound policy to penalize, and thus deter, active contractor participation in the design process, placing the contractor at risk unless it identifies all design defects." *Id.*

2. The government "prescription or proscription" test that the courts below employed in this case is the direct analogue for failure-to-warn claims of the *Shaw* formulation that the Court rejected for design defect claims. The "prescription" prong (that the Government has dictated the warning) is the equivalent of the *Shaw* requirement that contractor not have participated in the product's design. The "proscription" prong (that the Government has precluded additional warnings by the contractor) is the equivalent of the *Shaw* requirement that the

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[10]The "discretionary function" exemption to the Federal Torts Claims Act is codified at 28 U.S.C. § 2680(a).

contractor have provided alternative designs that the Government rejected.

As was true with the *Shaw* test for design defect claims, the "prescription or proscription" test for failure-to-warn claims fails to protect the federal interests embodied in the discretionary function exemption to the Federal Torts Claims Act. "The basis for the discretionary function exception was Congress' desire to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *Berkovitz* v. *United States*, 486 U.S. 531, 536-37 (1988)(quoting *United States* v. *Varig Airlines*, 467 U.S. 797, 814 (1984)). There is obviously discretion involved in determining whether and how to warn sailors in wartime (such as Mr. Ronsini) about the potential long-term effects of their exposure to asbestos or other toxic substances. The Courts of Appeals have ruled that claims that the Government failed to provide adequate warnings to military, or former military, personnel about possible dangers from their exposure during military service to toxic substances fall under the discretionary function exemption.[11] Moreover, with particular reference to

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[11]See, *e.g.*, *Minns* v. *United States*, 155 F.3d 445, 452 (4th Cir. 1998) ("[T]he decision whether to warn soldiers and their families of the potential effects of inoculations and pesticides [during the Gulf War] . . . amounted to a judgment call."), *cert. denied*, 525 U.S. 1106 (1999); *Maas* v. *United States*, 94 F.3d 291, 297 (7th Cir. 1996)("Deciding whether health risks [from radiation exposure during operation to recover nuclear weapon] justify the cost of a notification program, and balancing the cost and the effectiveness of a type of warning, are discretionary decisions . . . ."); *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 997 (9th Cir. 1987)("[A]ny decision whether to issue warnings to thousands of test participants [in nuclear weapons tests] of possibly life-threatening dangers and to provide them with appropriate examinations and counseling calls for the exercise of judgment and discretion at high levels of

(continued...)

asbestos, the Courts of Appeals have also ruled that (a) the Government's decision to use asbestos in merchant marine ships during World War II without establishing a safety program for sailors[12] and (b) the Government's decision to sell surplus asbestos "as is" without providing any additional warnings each fall within the discretionary function exemption.[13]

In *Boyle*, the Court reasoned:

> "It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production." 487 U.S. at 512.

The same conclusion applies to failure-to-warn claims. It makes little sense to hold the Government's contractor liable for lack of adequate warning (a) when a direct suit for failure-to-warn against the Government would be precluded by the discretionary function exemption, (b) when the Government controlled the content of the manuals accompanying the product, and (c) when the Government was as knowledgeable as the manufacturer about the product's hazards. Moreover, it makes little sense to adopt a standard for applying the government contractor defense to failure-to-warn claims that

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[11](...continued)
government."), *cert. denied*, 485 U.S. 905 (1988); *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 194, 201 (2d Cir. 1987)("The very paucity of proof concerning the possible deleterious effects of Agent Orange made the decision whether to issue a nationwide health warning even more clearly an exercise of discretion.")

[12]*Gordon* v. *Lykes Bros. S.S. Co.*, 835 F.2d 96 (5th Cir. 1988), *cert. denied*, 488 U.S. 825 (1988).

[13]*Lively* v. *United States*, 870 F.2d 296 (5th Cir. 1989); *Smith* v. *Johns-Manville Corp.*, 795 F.2d 301 (3d Cir. 1986).

allows *Boyle* to be avoided simply by pleading the case as one for failure to warn rather than as one for design defect.

In short, there is a fundamental conflict in the rationale employed by the New York courts in this case in restricting the government contractor defense as applied to failure-to-warn claims and the rationale employed by the Court in *Boyle* in adopting that defense for design-defect claims. The standard applied in this case fails to focus, as *Boyle* requires, on whether the Government exercised discretion in reviewing and approving the warnings accompanying the equipment.

This conflict provides an additional reason on why this Court's review is needed. The Court should grant review and adopt a standard for failure-to-warn claims, such as that formulated by the Sixth Circuit (*Tate I*, 55 F.3d at 1157), that places application of the government contractor defense for failure-to-warn claims on the same analytical footing on which *Boyle* rested application of that defense for design defect claims.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition, certiorari should be granted to review the judgment in

this case of the Appellate Division of the New York Supreme Court.

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February 11, 2000

Supreme Court, U.S.
FILED
FEB 2 2 2000
CLERK

(4)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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Tate v. Boeing Helicopters,
55 F.3d 1150 (6th Cir. 1995) 6

Trevino v. General Dynamics Corp.,
865 F.2d 1474 (5th Cir.), *cert. denied*, 494 U.S. 935 (1989) 5

Yeroshefsky v. Unisys Corp.,
962 F. Supp. 710 (D. Md. 1997) 6

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The petition explained three dispositive reasons for this Court to grant review. First, by second-guessing a military procurement decision, the decision below directly impinges upon the federal government's constitutional authority and duty to provide for the common defense. Second, the decision below conflicts with this Court's articulation of the government contractor defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and *Hercules Inc. v. United States*, 516 U.S. 417 (1996). Third, there is an acknowledged split among the federal appellate courts on the question presented; the outcome in this case would have been different in four and possibly five of the seven circuits that have considered the issue. Pet. 15-19.

Respondent fails even to address the fundamental issues of federalism. With respect to the clear split of authority on the standard for applying the government contractor defense in duty-to-warn cases, respondent offers a pastiche of contradictory and incorrect propositions. For example, respondent argues inconsistently that the decision below both "follows" *Boyle* and "correctly ruled" that because military specifications did not affirmatively prescribe or prohibit a warning -- an element foreign to *Boyle* -- the jury was not entitled to consider the government contractor defense. Opp. 8-9. A similar flaw in respondent's argument is its repeated effort to masquerade the clear conflict in the circuits as simply the manifestation of idiosyncrasies in state law. *See, e.g.*, Opp. 13 ("solely on the basis of Maryland products liability law"); 14 n.7 ("applying the law of Georgia . . . there was no duty to warn"); 19-20, n.12 ("product liability principles peculiar to New Jersey"); *see also id.* at 7 n.5 ("New York's discrete judgment molding principles"). That argument proves our point. The government contractor defense is a feature of federal law that requires a uniform national standard. Under no rational

system can a supplier's wartime duty to the military be defined 50 years later by 50 different state courts.

Contrary to respondent's failure to perceive the glaring conflict of authorities, the judges before whom this question arises have repeatedly acknowledged the circuit conflict. Decisions of the Sixth Circuit and district courts in Maryland, New Jersey, New Hampshire, Wisconsin and the District of Columbia have all expressly commented on the lack of appellate unanimity. *See* page 6 nn. 5-6, *infra*. Absent any principled basis for reconciling the disparate decisions on an important and recurring question of federal law -- on which uniformity is constitutionally mandated -- this Court's review is plainly warranted.

Nor should the Court be dissuaded from granting certiorari by respondent's dissembling recitation of the record in this case. Notwithstanding respondent's rhetorical barbs, petitioner raised the government contractor defense at trial, unsuccessfully requested a jury instruction that quoted *Boyle* verbatim, argued the issue in the Appellate Division (which held that the jury need not be instructed on the government contractor defense), and raised the issue again in seeking review in the New York Court of Appeals. Pet. 5-7; Pet. App. 73a; Opp. 2-3. Finally, there is no merit to respondent's facile declaration that the record lacks evidence on elements of the government contractor defense. Opp. 2, 6. Contrary to respondent's extraordinary distortion of the record, there were indeed facts sufficient to establish the defense and that should have led to the entry of judgment in petitioner's favor or, at least, required resolution by a correctly instructed jury. Precisely because most of the federal appellate courts would have reversed the judgment in this case, the conflict of authority could not be more concrete and deserving of this Court's guidance.

1. Contrary to respondent's argument, the decision below directly conflicts with this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The departure from *Boyle* is starkly evidenced in the trial court's charge to the jury, Pet. App. 73a, and the Appellate Division's holding, *id.* at 3a.

At trial, Worthington established each of the requisite elements of the government contractor defense set forth in *Boyle*. As to the first *Boyle* prong, the United States approved reasonably precise specifications. Worthington had no involvement whatsoever in the design of the equipment; the equipment was built to plans and standards of an entirely different company, DeLaval, which were supplied *to* Worthington *by* the Navy.[1] App., *infra*, 79a. The Navy's detailed plans and specifications included express requirements for asbestos-containing components, markings on the equipment, and the contents of the technical manuals,[2] and Worthington was prohibited from making any

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[1] It is not the case that Worthington "made all of its machinery the same way, regardless of whether it was sold to the Government." Opp. 5. Just the opposite is true. *E.g.*, Pet. App. 48a. The compressors were used to operate the torpedo tubes on naval destroyers. *Id.* at 55a. And there is no evidence that Worthington ever sold any of these Navy destroyer pumps commercially. Failing to find any evidentiary support in this trial record for its incredible assertions, respondent instead relies on opinions in other cases, including one decided on a jurisdictional motion to remand a removed action to state court. Opp. 5 n.3.

[2] The military specifications not only required asbestos gaskets in the equipment, but also required that all replacement gaskets meet the original specifications. App., *infra*, 83a-90a. Moreover, the gaskets themselves were governed by detailed military specifications requiring the gaskets to be made from a specified type of asbestos material. *Id.*; Pet. App. 51a-53a. Accordingly, there is no merit to respondent's assertion that there was no military specification for the replacement parts. Opp. 6, 17 n.10.

modifications or additions to the equipment or technical manuals without Navy approval. Pet. App. 42a, 48a, 50a-59a, 63a-65a; App., *infra*, 79a-85a.

As to the second *Boyle* prong, Worthington's equipment conformed to the Navy's specifications. Pet. App. 48a-49a, 54a. As to the third prong, there were no dangers in the use of the equipment known to Worthington but not known to the United States. *Id.* at 36a-39a. Respondent's assertion (Opp. 3-4) that "the jury found, that Worthington had actual and constructive knowledge of the extreme hazards of the asbestos placed in or over its equipment" is flatly incorrect. Respondent fails to cite any evidence, nor is there any, that Worthington had *actual* knowledge of any danger to workers like Ronsini;[3] the jury was neither asked to make, nor ever made, any such finding, Pet. App. 15a-20a; and the trial court expressly and correctly found that there was no evidence that Worthington actually knew of any risk to workers like Ronsini. *Id.* at 8a.[4] That in itself is sufficient to satisfy the third element of *Boyle*. *See, e.g., Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1001 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) ("*Boyle* does not require the contractor to warn the government of every possible

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[3] Instead, respondent points (Opp. 4) to a 1944 article about dust diseases that discussed asbestosis in the insulating trade, an entirely different industry and a work environment totally unlike what respondent encountered in 1972 when working with replacement gaskets placed inside of pumps Worthington sold 30 years earlier. App., *infra*, 77a-78a.

[4] Respondent attempts to brush aside the trial court's express, undisturbed finding on this point, characterizing it as an "unrelated" ruling "concerning New York's discrete judgment molding principles." Opp. 7 n.5. Respondent's argument misses the mark. The trial court reviewed evidence of knowledge in ruling on Worthington's post-trial motion to dismiss the finding of recklessness and its determination is unconditional and unequivocal. Pet. App. 8a.

danger – only those known to it and not to the government"); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1487 (5th Cir.) ("After *Boyle* a government contractor is only responsible for warning the government of dangers about which it has actual knowledge"), *cert. denied*, 493 U.S. 935 (1989).

In sharp contrast to Worthington's lack of knowledge, respondent's expert witness admitted that the United States knew of the dangers of asbestos as early as 1918. Pet. App. 36a-38a. He also testified that the Navy was aware of the hazards of asbestos in the workplace at least as early as 1947, and recommended in Naval publications that appropriate ventilation systems be used to reduce asbestos hazards, that workers be given respirators, and that dust level counts be taken to determine whether a hazard existed. App., *infra*, 76a. Thus, there is nothing about which Worthington could have warned that the United States did not already know.

Against this background, respondent Ronsini testified that when he came in contact with the pumps more than 25 years later, the Navy provided no mask or respirator, App., *infra*, 91a; the Navy assigned him to work on the engines in a windowless room with no fresh air, *id.* at 91a-92a; the ship was in a war zone, *id.* at 93a; although he wanted fresh air, neither he nor anyone else left the engine room while working, Pet. App. 33a; and he never complained to anyone about the conditions because "[i]t wasn't like a regular job. It wasn't a union." *Id.* at 34a.

Despite this factual predicate, the trial court denied Worthington's proposed jury instruction that incorporated the language of *Boyle* verbatim. Pet. App. 67a-71a. The Appellate Division went one step further, concluding that unless the United States affirmatively prescribed or

prohibited a warning, an element not required by *Boyle*, the defense need not even go to the jury. *Id.* at 3a.

2. The decision below is not only contrary to *Boyle*, but also conflicts with the holdings of the majority of federal circuits that have considered the issue. Pet. 13-19. Studiously avoiding the core issues on which the lower courts have split, respondent seeks to alter the question presented by arguing that "Worthington wrongly suggests that no government involvement is required at all...." Opp. 12. The question presented is not *whether* the government was involved at all, but the *extent* of the government's involvement necessary to establish the defense.

Although respondent may not perceive a conflict, the courts trying these cases certainly do. The conflict has been acknowledged expressly by the Sixth Circuit[5] and district courts in Maryland, New Jersey, New Hampshire, Wisconsin, and the District of Columbia.[6] Even those

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5 *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995) (rejecting view of circuits that require a "dictation or prohibition of warnings" because those circuits "require a higher level of government involvement than we think is required").

6 *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 717-18 (D. Md. 1997) (collecting cases and describing three-way split); *Russek v. Unisys Corp.*, 921 F. Supp. 1277, 1292 (D.N.J. 1996) (collecting cases and following lead of Fifth and Fourth Circuits); *Ritch v. AM Gen. Corp.*, No. 93-451-SD, 1996 U.S. Dist. LEXIS 8361, at *8-*9 (D.N.H. Mar. 28, 1996) (noting that "[t]here is less agreement ... as to how to determine whether the government exercised the level of discretion required by Boyle's first condition in approving the subject warnings"); *Oliver v. Oshkosh Truck Corp.*, 911 F. Supp. 1161, 1182-83 (E.D. Wis.) (discussing split), *aff'd*, 96 F.3d 992 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Haltiwanger v. Unisys Corp.*, 949 F. Supp. 898, 905-06 (D.D.C. 1996) (discussing split between the Second and Eleventh Circuits and the Sixth Circuit).

circuits that have tried to reconcile the varying positions have done so by *rejecting* the position adopted by the New York courts here. *See Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1004 n.8 (7th Cir. 1996) (rejecting as inconsistent with *Boyle* the requirement that the government either "prohibit" or "dictate" the contents of warnings), *cert. denied*, 520 U.S. 1116 (1997).

In trying to explain away this acknowledged conflict, respondent makes sweeping claims of consistency, for which it cites only the Second, Ninth, and Eleventh Circuits, *viz.*, those that have adopted the minority view. Opp. 10. For example, respondent asserts that "in the warnings context, the courts consistently state the issue to be whether the contractor could have complied 'with both its contractual obligations and the state-prescribed duty of care' with regard to the warnings, and whether a 'conflict exists between the state tort duty and the federal contractual duty.'" *Id.* The Sixth Circuit emphatically rejected that very argument in *Tate v. Boeing Helicopters*, 140 F.3d 654, 660 (6th Cir. 1998).

Respondent's other attempts to reconcile the cases are no more availing. Contrary to respondent's argument (Opp. 13), *Emory v. McDonnell Douglas Corp.*, 148 F.3d 347 (4th Cir. 1998), does not support the proposition that a "failure-to-warn claim must be separately scrutinized for a 'significant conflict' as between state law requirements and Federal interests." Rather, the Fourth Circuit began its analysis by finding that the government contractor defense articulated in *Boyle* applies equally to design defect and failure-to-warn claims. 148 F.3d at 350. The court went on to hold that because the Navy had extensive knowledge of the dangers associated with the crash aircraft, the contractor had no duty to warn the Navy of potential hazards. 148 F.3d at 341-52. Moreover, contrary to the New York court's holding here,

the Fourth Circuit also observed that the plaintiff could not, in any event, maintain a claim that the contractor failed to warn individual military pilots about the unsafe condition of the aircraft. 148 F.3d at 352.

Similarly mistaken are respondent's assertions about the Fifth Circuit. *In re Air Disaster at Ramstein Air Base*, 81 F.3d 570, *modified sub nom.*, *Perez v. Lockheed Corp.*, 88 F.3d 340 (5th Cir.), *cert. denied*, 519 U.S. 1028 (1996), is not the "leading and most current Fifth Circuit opinion" to address the issue. Opp. 14. To the contrary, the district court in that case did not even rule on defendants' government contractor defense and applied a state statute of repose to bar plaintiffs' duty-to-warn claim. 81 F.3d at 573. In *dicta*, the Fifth Circuit stated that "[a] separate failure to warn claim may survive the government contractor immunity defense," but that "if the failure to warn claim is part of the design defect or unreasonably dangerous product theory of liability, then government contractor immunity applies." *Id.* at 576. In its subsequent modification of the opinion, the Fifth Circuit concluded that McDonnell Douglas had no duty to warn the Air Force, much less the individual pilots. 88 F.3d at 341. In any event, the *Ramstein* dicta is directly contrary to the Fifth Circuit's holding in *Bailey v. McDonnell Douglas Corp.*, that "whether the defense will apply cannot be determined by the label attached to the claim." 989 F.2d 794, 801 (5th Cir. 1993), *citing Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990) (if applicability of the defense were to depend on the peculiarities of state tort law, then "state law could operate either to defeat the defense or to expand it improperly, and the defense could not be applied with the uniformity that is a key justification for application of federal common law").

In *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989), by contrast, the Fifth Circuit directly addressed the issue, and affirmed summary judgment based on the government contractor defense, holding that the plaintiff's design defect, breach of warranty, *and* failure-to-warn claims were barred as a matter of law because Xerox had established the three elements of *Boyle*. Contrary to respondent's assertion here (Opp. 15), the appeal in *Smith* was not confined to the design defect cause of action, and the Fifth Circuit drew no distinction between the two causes of action, concluding instead that both were equally barred by the government contractor defense.[7] *See Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 800 (5th Cir. 1993) ("[W]e stated in *Smith* ... that '*Boyle* ... held that the government contractor defense applies to both negligence and strict liability actions, as well as to other state law tort claims.' We then affirmed a summary judgment based on the defense that dismissed all claims, including manufacturing defect, design defect, failure to warn, and breach of warranty").

Respondent's argument with regard to the Sixth Circuit is particularly disingenuous. Respondent argues (Opp. 17-18) that there is a "consensus" that the contractor must show a "continuous back and forth" review. That is incorrect. There are two different ways to satisfy the first element of *Boyle*: Either the government can provide the precise specifications to the contractor, *Boyle*, 487 U.S. at 509 n.8, as occurred here, *or* the contractor can develop the

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[7] The fact that *Smith* stated it was consistent with *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), merely confirms that the Fifth Circuit applies the *Boyle* test without regard to the type of product liability claim. *McKay* was a pre-*Boyle* design defect claim in which -- unlike in later duty-to-warn cases -- the Ninth Circuit did not require any showing that the United States affirmatively prescribed or prohibited warnings.

specifications and there is a "continuous back-and-forth" between the contractor and the government. *Koutsoubos v. Boeing Vertrol*, 755 F.2d 352, 355 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985). Because the Navy supplied the specifications to Worthington, there is no need even to consider whether any "back-and-forth" occurred.

3. The conflicting decisions in the lower courts show that there is a pressing need for this Court to establish a single, clear national standard for application of the government contractor defense in duty-to-warn cases. As reflected in the *amicus* brief filed by Bell Helicopter Textron, Inc., this issue is not confined to asbestos-related cases; it has broad application to all government contractors and raises substantial practical concerns for the federal government generally and the military in particular. Moreover, the issue implicates core constitutional notions of federalism. This Court should heed the request of lower courts and articulate the correct national standard.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 2000

APPENDIX

APPENDIX J

Excerpts From the Trial Transcript (November-December 1996)

[reprinted in Plaintiff's CA App. A506-A507]

Castleman - by Plaintiff - Cross/McTiernan

Q. So I am correct, doctor, am I not, that the United States Navy, as early as 1947, was aware of the association between asbestos and disease and the need to protect workers in the navy by the use of appropriate ventilation systems, and where appropriate, respiration devices and the appropriate checking of dust levels in the naval work environment, correct?

A. Yes.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 707-709]

Castleman - Plaintiff - Direct

Q. And where -- first of all, what trade magazines are you aware of that discussed hazards of asbestos?

A. Well, Asbestos Magazine carried a couple of notices about pulmonary asbestosis in 1928 and in 1930, but not after that for a long time.

Q. And as far as you understand, based on your review of the information that you've compiled in doing your book and your thesis, what was the reason for them stopping publishing these articles?

MR. GARRY: Objection.

MR. McTIERNAN: Objection

THE COURT: Sustained.

Members of the jury, disregard that question.

Q. You said the article stopped being published when?

A. March of 1930.

Q. Now, to whom did Asbestos Magazine go out to?

A. Companies that were mining asbestos and using it in manufacturing, primarily they were the ones who were the main advertisers, they were the ones whose products

were discussed, whose patents were discussed, whose new products were being marketed, and so on, were discussed.

Q. Were there any other trade magazines where the hazards of asbestos were discussed, that you're aware of?

A. Yes.

Q. What other trade magazines?

A. One was called Heating and Ventilating Magazine; that was sent to construction contractors. And in 1944, carried an article about dust diseases by Professor Hutchinson, who talked about asbestosis, and talked about asbestosis as a hazard to people in the insulating trade.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1826-1829]

Arsi - Defendant/Worthington - Direct/Garry

Q. Let me stop you there, Mr. Arsi. You mentioned DeLavalle, and I noticed on the drawing it says DeLavalle plan number G 10194H.

Do you know why the name DeLavalle is on this particular drawing?

A. Yes. These particular pumps that were manufactured by Worthington are actually to DeLavalle standards and plans, that was typical during World War II, and in other times when the government had high demand and there was limited production, they would take standardized drawings with government standard information on it and supply it to the manufacturers in the country during time of war to be able to support the efforts, so when you had to produce 70, 80, 100, 200 boats all between 1943 and 1944, they weren't just going to go to the original designers, they went to all the other people in the industries to buy all sorts of things, they supplied to many industries, but for pumps it was very normal to do this, so this is actually DeLavalle pumps.

This long continuous bar is the shaft of the pump, and it spins these impellers, it happens to be two in this pump, and where it spins and comes out of the pump it has to be sealed, and these small crosshatch pieces are the packing rings.

These can be inserted into the pump and tightened down so that there is just a little bit of leakage that comes out of the pump. It's what stops the pump from

leaking literally all over the floor, or in this case all over the decks of the ship.

If I look at the various balloons for these packing rings or if I look for the numbers over here, I can find that the packing, which is piece number 65, says packing ring, quantity is six, the material is cotton case plastic metallic.

Q. Is that asbestos containing?

A. No, it is not.

MR. GARRY: Objection.

THE COURT: Sustained. Let the witness testify. Reframe the question.

A. Under this column it gives the naval department --

THE COURT: Could we have a question please?

Q. Mr. Arsi, the packing material that you just referred to, what kind of packing is that?

A. It is a packing used in higher temperature applications for boilers and condensates that is a plastic metallic described in the government specification with an outer cotton case, a wound cotton case.

Q. Okay. Now, with respect to any asbestos containing components, can you point out to the jury which if any would be found in this particular piece of equipment?

A. Yes, I can. This pump is put together in two halves and bolted together to hold it together. There would

be a gasket that would hold these two halves together, and it is identified as gasket 1/64th inch, asbestos fiber, and I believe that is the only gasket that is asbestos fiber.

There are other gaskets for small components like a coupling, and that you'll see over here is manila paper.

So by reviewing this drawing and these identifications, I know how the pump was built and what was in it, including the materials in construction.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1863-1867]

Arsi - by Defendant Worthington - Cross

Q. Mr. Arsi, besides the pumps that were being sold to the government, Worthington had asbestos gaskets and packing and pumps in other machinery that wasn't being sold to the government but was being sold to other customers, correct?

MR. GARRY: Objection, Judge.

THE COURT: If you know.

Overruled.

A. I don't know. I believe so.

Q. I mean that wasn't unique just to government equipment, was it, Mr. Arsi?

A. No, gaskets and packing are common to much machinery and equipment.

Q. Including asbestos containing gaskets and packing, correct?

A. Yes.

Q. Now, you've already told us, Mr. Arsi, that the pumps -- well let's -- the pumps sold for use on naval ships during this period contained asbestos gaskets and packing, correct?

MR. GARRY: Objection.

THE COURT: Overruled.

A. Are you referring to the context of the pumps in question today?

Q. Yes.

A. Yes, I have.

Q. And Worthington knew that when these gaskets or packings were removed from the pumps and the compressors, whatever machinery was sold to the government, they would be replaced with the same kind of materials that were in the original, correct?

MR. GARRY: Objection.

THE COURT: Sustained.

Members of the jury, disregard that question.

Q. Well, are you aware whether the gaskets and packings that were contained in your pumps during this period would be replaced with the same kind of materials that were in the original pump and equipment?

MR. GARRY: Object to the form of the question.

THE COURT: Sustained.

Q. Mr. Arsi, you told us that there were certain specifications in the Navy, correct?

A. Yes.

Q. And those specifications said that the pumps had to have certain gaskets and certain packing, correct?

A. They reference styles of and types of, yes.

Q. And Worthington supplied to the government, when they first supplied the equipment, the packing and gaskets that were part of the specification, correct?

A. That is correct.

Q. And Worthington had no reason to believe that as that packing and gasket was replaced, the same kind of gasket and packing as testified would be used?

MR. GARRY: Objection to the form.

THE COURT: Sustained.

Q. Do you have any knowledge about the kind of material that would be replaced in your pumps for that year class?

MR. GARRY: Objection to the form.

THE COURT: Overruled.

A. The type of packing or gaskets or any other components of the parts, would be sourced from the parts list that are on the drawings.

Q. And if this part list says that there's an asbestos component, it would be replaced with asbestos component, fair enough?

A. Yes, I believe so.

Q. That's something Worthington would have known?

MR. GARRY : Objection to form.

THE COURT: Sustained.

Members of the jury, disregard the question.

Q. Well, from all of your understanding of the history of Worthington, and your review of all the records and your discussions, that's something Worthington would have known --

MR. GARRY: Objection to the form.

THE COURT: Sustained. You have two questions in there. I'm not sure either one could be asked, even if you asked them separately.

Q. Based on your knowledge, you know that asbestos gaskets are specified by the government would be replaced in your equipment, do you not?

MR. GARRY: Objection

THE COURT: Overruled.

A. I know that the original plans and specifications required asbestos materials.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1941-1943]

Merrick - Defendant/Worthington - Direct/Garry

Q. Now, I think you testified, sir, that the folks at Worthington knew that these gaskets and packings had to be replaced in the normal use of this compressor, correct?

A. Yes.

(continued on next page.)

Q. The people at Worthington knew you were aware that these gaskets and packings would be replaced with the same kind of materials that were in the originals, correct?

MR. BLUTMAN: Objection

THE COURT: I'm going to sustain the objection.

Members of the jury, disregard the question.

Q. There was a requirement of what kind of gasket had to be in the compressor, correct?

MR. BLUTMAN: I'm going to object, Judge.

THE COURT: Overruled.

A. Yes, there was a requirement for what was in the original compressor.

Q. And you supplied the gasket that the Navy wanted you to supply, correct? Worthington did?

A. Yes.

Q. And Worthington knew that when these gaskets were replaced, they'd be replaced with the same material that you were required to put in there, correct?

MR. BLUTMAN: Objection, Judge.

THE COURT: Sustained. Members of the jury, disregard that question.

Q. Well, based on your knowledge that you say you've accumulated over the years, was it your understanding that the replacement parts that were put in the compressors, namely the gaskets and packing, would be the same kinds of parts that you originally supplied?

MR. BLUTMAN: Objection.

THE COURT: Overruled.

A. What was supplied as spare parts, would have to match what the original equipment was. There was no spec for it, no mill spec for the material. Military specification.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1953-1956]

Merrick - Defendant/Worthington - Cross/Komitor

Q. Now, I'd like to have you turn to page 20 of this manual.

Do you see under the heading gaskets?

A. Yes.

Q. And could you read the first sentence to me?

A. The gaskets for the various points on the compressor should be made in accordance with material and Navy specifications indicated below.

Q. So was it Worthington's recommendation to its users that they should be using these types of gaskets, as specified on the next page?

MR. BLUTMAN: Objection.

THE COURT: Could you reframe the question, Counsel. Come on.

Q. Is it your understanding that it was Worthington's recommendation to the user of its compressors that the gaskets should be replaced in accordance with the specifications contained on page 21?

MR. BLUTMAN: Objection.

THE COURT: Overruled.

A. Could you repeat that now?

MR. KOMITOR: Maybe the court reporter can. Read this back, please

(Record read.)

A. I don't believe this is a recommendation, I think it's just a stating of a fact that they have to be made in accordance with that material.

Q. So it wasn't a recommendation, it was a requirement, is that what you're saying?

A. It's a fact. It states --

Q. So Worthington was stating in its own -- in its manual, that this is what has to be done, correct?

MR. BLUTMAN: Objection, Judge, he's indicated his answer.

THE COURT: This is cross-examination, there is some leeway, but you have to frame it properly.

Sustained.

Q. You're saying Worthington wasn't recommending this. Is it true then, Mr. Norton, that Worthington was telling the user these are the gaskets you have to use in replacement in our compressors?

MR. BLUTMAN: Objection, Judge.

THE COURT: Overruled.

A. The statement in here is a fact. I'm not saying that I recommended or Worthington represented it or who represented it. It's just a statement of fact.

Q. It was a statement made by Worthington in its manual, correct?

A. It's in our manual, yes.

[END OF EXCERPT]

* * *

[reprinted in Plaintiff's CA App. 121-124]

Q. Now, during this period of time when you were working on the ship, was your mouth or nose covered?

A. No.

Q. There was no mask or respirator made available to you?

A. No.

Q. Now, in getting into the engine room is it correct that there would be in effect like a hole that a man would climb down into?

A. Yeah; it was like a porthole.

Q. About how wide would that be?

A. It would be about the size of a manhole cover, about 36 inches around.

Q. And would there be any windows in the area where you were working?

A. No.

Q. And the dust that was around you, would that surround you all day while you were on the ship? Let's take the Weeks specifically.

A. Yes.

MR. DWYER: Objection.

BY MR. REICH:

Q. When it was surrounding you, the air that you were breathing, to your knowledge where was that air coming from?

A. There was some air coming from above deck and I think some air that was recirculating from below the engine room.

[END OF EXCERPT]

* * *

[reprinted in Plaintiff's CA App. 139-140]

Q. Now, you were in the war zone off Vietnam; correct?

A. Yes.

Q. And were you on the Weeks for 30 days at a time during this tour?

A. Occasionally.

Q. And during those tours were the five-inch guns being fired?

A. Yes.

Q. Now, when the five-inch guns were fired were you below deck?

A. Sometimes.

Q. Now, when you were below deck, what did you observe with respect to dust?

A. A vibration; and dust would be emitted into the room.

Q. And would it be greater in terms of dust than when you were working without the guns being fired?

A. Without the guns, yes.

Q. Why is that?

A. Because the guns would cause vibration that would knock it off the pipes and the turbines.

Q. Now, did any of the insulation come off any of the equipment during the time the guns were fired?

A. Not that I remember.

[END OF EXCERPT]

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